TEXAS REGISTER

Volume 37 Number 48 *November 30, 2012* *Pages 9413 - 9552*

Thomas Huizar

6FKRROFKLOGUHQVDUWLFOHVXEPLWWHGWRGHFLGHZKHWKHURUQRWFRYHUDQGEDQNLQJSDJHVRI WKH *Texas Register* 7HDFKHUVWKURXJKWKHVWDWHGUDZLQJIRUWKHGHQWLQ JUDGHV. 7KHGUDZLQJVGHVXSWKHRWKHUWKUHHJUDSDJHVRI WKH *Texas Register* DQG LQWRGXFHVWXGHQWVWRWKLVREVFXUHEXWP SRUWDQWDJHQF\RI WKHJRYHUQP HQW

7KHDUWZRUWHDXHG RQ WKHIURQWFRYHULVFKRVHQ DWUDQGRP ,QVIHGHFK LVXH WKH DUWZRUN SXEOLVKHQ ZKDWZRXOG RWKHUZLVHEHEODQSDJHVLQ WKH *Texas Register.* 7KHPHEODQSDJHVDUHFDXVHGE\ WKHSURGXFWLRQSURFHVVXVHGWRSULQWWKH*Texas Register*

***Texas Register,* (ISSN 0362-4781, USPS 120-090),** LV SXEOLVKHG ZHHNO\ WP HVSHU\HDU IRU IRUILUVWFODVV P DLOGHOLYHU E\ / H[LV1H[LV 0 DWKHZ %HQGHU &R ,QF %URDGZD\ $OEDQ\ 1 <

0 DWWHULDOQWKH*Texas Register* LVWKHSURSHUW\RI WKHVWDWHRI 7H[DV + RZHYHU LW P D\ EHFRSLHG UHSURGXFHG RUUHSXEOLVKHG E\ DQ\ SHUVRQ ZLWKRXWSHUP LVVLRQRI WKH*Texas Register* GLHFWRUSURYLGHG QR VXFKUHSXEOLFDWLRQ VKDOOEHDUWKHOHJHQG *Texas Register* RU2 IILFLDO ZLWKRXWWKHZULWWHQSHUP LVVLRQRI WKHGLHFWRU

7KH*Texas Register* LVSXEOLVKHG XQGHUWKH* RYHUQPHQW&RGH7LWOH &KDSWHU 3HULRGLFDOV3RVWDJH3DLGDW\$OEDQ\ 1 < DQGDWDGGLWLRQDOP DLOLQJRIILFHV

POSTMASTER: 6HQGDGGUHVVFKDQJHVWR WKH*Texas Register,* &DLOD5G &RQNOQ 1 <

DVHFWLRQRI WKH
2 IILFHRI WKH6HFUHWDU\RI 6WDWH
3 2 %R[
$ XVWLQ7;

)\$;

KWWS6ZZZ VRVWDWHWH[XV
UHJLVWHU VRVWDWHWH[XV

Deputy Secretary of State –
&RE\ 6KRUWHV,,,

Director –
' DQ3URFWU

Staff
3DWULFLD\$JXLUH%XUFK
/ HZ6HQDYLGHV
' DQD%DQQRQ
(OOHQ&UHDVH
.UL+RJDQ
%HWKDQ. LN
5REHUW. QLKW
-LOO6 / HGEHWWH
6 * DLO. RRGV
0 LFKDHO=HSHGD-DUPLOOR

ADOPTED RULES

TABLES AND GRAPHICS

IN ADDITION

2SHQ0HHWLQJV

6WDWH LGHDJHQFLHV DQG HJIRQDO DJHQFLHV WBWH[WQG IQWR IXURUP RUHI FRXQWHV SRWW P HHWLQJ QRWLFHV ZLWK WKH6HFUHWDU\ RI 6WDWH

0 HHWLQJ DJHQGDVDUHDYDLODEOHRQWKH*Texas Register* V,QWHHWQLWH KWWS ZZZ VRVWDWHWXVSHQIQGH[VKWPO

0HP EHUVRI WKHSXEOLF DYR P D\ YLHZ WKHHQRWFHV GXULQJ UHJXOREUIFHKRXUVIURP D FRPSXWHUWHUPLQDOLQWKHORBEE\ RI WKH-DP HV(DLO5 XGHU%XLOGLQJ %UDJRV FRUQHU RI WK6WHHWDQG %UDJRV \$XWQ 7H[DV 7RUHTXHVWD FRS\ E\ WDSKRQH SOHDVH FDOO 2UHTXHVWD FRS\ E\ HPDLO UHJWW# VRVWDWHWXV

)RUL WHVH**not** DYLODEOHKHUH FRQWFWWKHDJHQFLHV ,WHPVQRWRXQGKHUH

- P IQXWHVRI P HHWLQJV
- DJHQGDVIRUORFDOJRYHUQPPWERGLHVDQG UHIRQDODJHQFLHVWKDWH[WQG IHZHU WKDQIRXUFRXQWHV
- OHJLVODWLYHP HHWLQJVQRWXEHPWWRWKHRSHQP HHWLQJVOZ

7KH2IILFH RI WKH\$WWRUQH\ *HQHUDORIIHUV LQIRUPDWRQ DERXWWKRSHQP HHWLQJV OZ LQFOXGLQJ)UHTXHQWO\ \$VNHG 4XHVWRQV WKH *Open Meetings Act Handbook* DQG 2SHQ 0 HHWLQJV2 SIQIRQV KWWS ZZZ RDJ WDWHWXVSHQIQGH[VKWPO

7KH\$WWRUQH\ *HQHUDO2SHQ*RYHUQPPW+RWOLQHV 2 3(1 RUWROO IUHHDW 2 3(1 7(;

\$GGLWRQDOLQIRUP DWRQDERXWWDMRYHUQPPW P D\ EHIRXQGKHUH KWWS ZZZ WI[DVJRY

Meeting Accessibility. 8QGHUWKH\$P HULFDQVZLWK'LVDELOLWLHV\$FWDQ LQGLYLGXDOZLWK D GLVDELOLW P XWKDYH HTXDORSSRUWQLW IRUHIIHFWLH FRP P XQLFDWRQ DQG SDUWLSDWRQ LQ SXEOLF P HHWLQJV 8SRQ UHTXHWDJHQFLHVP XWSURYLGHDX[LOLDU DLGVDQG VHUYLFHV VXFK DV LQWHUSUHWHUVRUWKHGHDDQG KHDLQJLPSDLUHGHV ODUJHSULQWHULDOGRFXPHQW ,QGHWHUPQJ WSRI DX[LOLDU DLG RUVHUYLFH DJHQFLHVP XWJLYHSULPU FRQVLGHUDWRQ WR WKHLQGLYLGXDOHTXHVW7KRVH UHTXHVWQJ DX[LOLDU DLGVRUVHUYLFHVKRXOG QRW\ WKH FRQWFWSHUVRQ OWWG RQ WKH P HHWQJ QRWHV VHYHUDOGD\V EHIRUH WKH P HHWQJ E\ P DLO WDSKRQH RU5(/ \$< 7H[DV 77<

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Requests for Opinions

RQ-1098-GA

Requestor:

Kyle L. Janek, M.D.

Executive Commissioner

Texas Health and Human Services Commission

Post Office Box 13247

Austin, Texas 78711

Re: Whether the Health and Human Services Commission is authorized to pay interest on the amount paid to the Employees Retirement System to restore a reinstated employee's service credit (RQ-1098-GA)

Briefs requested by December 17, 2012

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201205975
Katherine Cary
General Counsel
Office of the Attorney General
Filed: November 16, 2012

♦ ♦ ♦

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER J. COSTS, RATES AND TARIFFS

DIVISION 1. RETAIL RATES

The Public Utility Commission of Texas (commission) proposes the repeal of §25.238, relating to Power Cost Recovery Factors, and new §25.238, relating to Purchased Power Capacity Cost Recovery Factor. The new section will provide a mechanism, outside of a base-rate proceeding, by which an electric utility may seek to recover certain reasonable and necessary purchased power capacity costs, excluding costs associated with direct or indirect purchases from affiliates of the utility, incurred in the course of providing reliable electric service to ratepayers. The rule would allow a utility to apply to establish a purchased power capacity cost recovery factor (PCRF) rider with the requirement that it be adjusted once a year to reflect appropriate costs, changes in demand, over- and under-recoveries, and changes in revenues resulting from load growth. The rule would provide for the reconciliation of costs recovered through the PCRF at least once every three years, in conjunction with a fuel reconciliation proceeding. Project Number 39246 is assigned to this proceeding.

William Abbott, Director of Tariff and Rate Analysis, Rate Regulation Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Abbott has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the provision of a mechanism that allows timely reflection in rates of changes to certain purchased power capacity costs incurred by utilities. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Abbott has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received within 30 days after publication.

Initial comments on the proposal repeal and new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Sixteen copies of comments to the proposed repeal and new section are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed section. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 39246.

In addition, the commission solicits input on the following questions regarding the proposed new rule:

1. Should the proposed rule allow for the inclusion of the cost of firm energy purchases from unaffiliated entities along with the cost of purchased power capacity for recovery via the PCRF? If so, should subsection (i) of the proposed rule be amended to require crediting of off-system firm energy sales?

2. Should the proposed rule address purchases from a qualifying facility under the Public Utility Regulatory Policies Act? If so, how?

3. Should a process be established wherein a utility may seek commission review of a utility's purchase of power capacity or firm energy from an affiliate so that the utility may thereafter seek to include the costs of such a commission-approved purchase in its purchased power capacity cost recovery rider?

4. If the commission establishes the review process described in question 2, should such a process be available for both bilateral, wholesale market purchases as well as purchases made pursuant to a tariff of a Regional Transmission Organization and/or Independent System Operator (RTO/ISO)?

5. If the commission establishes the review process described in question 2, should it limit the frequency of such reviews in order to limit the intervenor and commission resources devoted to such reviews?

16 TAC §25.238

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Public Utility Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2012) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §36.051, which states that in establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses; PURA §36.058, which limits the commission's authority to allow the recovery of a payment made by an electric utility to an affiliate; PURA §36.204, which grants the commission the authority to allow timely recovery of the reasonable costs of purchased power; PURA §36.205, which permits the commission to use any appropriate method to provide for the adjustment of the cost of purchased electricity that has been accepted by a federal regulatory authority or approved after a hearing by the commission; and PURA §36.206, which provides what may be included in a purchased power cost recovery factor.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 36.051, 36.058, 36.204, 36.205, and 36.206.

§25.238. Power Cost Recovery Factors (PCRF).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205967
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 936-7223

♦ ♦ ♦

16 TAC §25.238

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2012) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §36.051, which states that in establishing an electric utility's rates, the regulatory authority shall establish the utility's overall revenues at an amount that will permit the utility a reasonable opportunity to earn a reasonable return on the utility's invested capital used and useful in providing service to the public in excess of the utility's reasonable and necessary operating expenses; PURA §36.058, which limits the commission's authority to allow the recovery of a payment made by an electric utility to an affiliate; PURA §36.204, which grants the commission the authority to allow timely recovery of the reasonable costs of purchased power; PURA §36.205, which permits the commission to use any appropriate method to provide for the adjustment of the cost of purchased electricity that has been accepted by a federal regulatory authority or approved after a hearing by the commission; and PURA §36.206, which provides what may be included in a purchased power cost recovery factor.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 36.051, 36.058, 36.204, 36.205, and 36.206.

§25.238. Purchased Power Capacity Cost Recovery Factor (PCRF).

(a) Application. This section applies to an electric utility that sells electricity.

(b) Definitions. The following terms, when used in this section, have the following meanings unless the context indicates otherwise.

(1) Class billing determinants--Kilowatt-hours (kWh) for each class that is not billed using a demand charge, and kilowatts (kW) for each class that is billed using a demand charge.

(2) Cost-year--The most recent historical 12-month period for which data are available at the time a utility prepares an application to establish, adjust, or terminate a PCRF.

(3) Net production capacity invested capital--Production capacity invested capital costs recorded in Federal Energy Regulatory Commission (FERC) Uniform System of Accounts 303, 310 - 317, 320 - 326, 330 - 337, and 340 - 347, less accumulated depreciation and adjusted for any changes in production capacity-related accumulated deferred federal income taxes and excluding any impact associated with Financial Accounting Standards Board Interpretation No. 48.

(c) Establishment, adjustment, and termination of a PCRF.

(1) A utility may apply for establishment of a PCRF rider only if the utility's most recent comprehensive base-rate proceeding established sufficient information to allow for the determination of values for the parameters in subsection (g) of this section, and no more than two years have passed since the final order in such a base-rate proceeding. The application in which the utility applies for the establishment or adjustment of a PCRF rider shall be limited to issues related to the establishment or adjustment of the PCRF rider.

(2) The PCRF shall not include:

(A) the cost of capacity purchased directly or indirectly, including through one or more intermediaries or pursuant to a tariff of a Regional Transmission Organization or Independent System Operator, from an affiliate, as defined in §25.5(3) of this title (relating to Definitions), of the utility; and

(B) the cost of capacity owned by the utility.

(3) A PCRF shall not be billed using a demand ratchet mechanism.

(4) Upon the establishment of a utility's PCRF, the utility shall annually file an application for an adjustment of the PCRF. The cost-year used in an annual PCRF adjustment shall be the 12-month period that immediately follows the cost-year used to set the existing PCRF. In addition, the utility shall file the application to adjust the PCRF promptly after the relevant cost-year data become available. The commission may establish a schedule for the filing of such applications.

(5) A utility may request to have its PCRF terminated as part of any annual PCRF adjustment proceeding. The final order approving the termination of a PCRF shall specify the date by which the utility shall be required to file an application for the final reconciliation of the costs and revenues associated with the terminated PCRF.

(6) Commission staff may petition at any time to terminate a utility's PCRF.

(7) A utility's request to establish, adjust, terminate, or reconcile a PCRF shall include the utility's direct testimony supporting the request.

(d) Notice of PCRF proceeding.

(1) Within one commission working day of filing an application limited to establishing or adjusting a PCRF, a utility shall provide notice of the application in accordance with the following:

(A) Method of notice.

(i) The utility shall serve notice of the application on the parties to the utility's last PCRF reconciliation proceeding or, if there has been no PCRF reconciliation proceeding, on the parties to the utility's last comprehensive base-rate proceeding.

(ii) The utility shall issue a news release and post the news release on its website.

(B) Content of notice. Notice provided pursuant to this paragraph shall include the following:

(i) The date the application was filed;

(ii) A description of the application, including the relief requested;

(iii) The date of the intervention and hearing request deadline. The date of the intervention and hearing request deadline shall be 30 days after the application was filed, except that if the date would fall on a day that is not a commission working day, the intervention and hearing request deadline shall be the first commission working day after the 30th day after the application was filed;

(iv) To the extent applicable, the existing PCRF and the proposed PCRF by rate class, and the percentage difference between the two;

(v) For an application seeking to establish or adjust a PCRF, the following statement: "The PCRF is subject to final review in the next PCRF reconciliation.";

(vi) The statement, "Persons with questions or who want more information on this application may contact (utility name) at (utility address) or call (utility toll-free telephone number) during normal business hours. A complete copy of this application is available for inspection at the address listed above"; and

(vii) The statement, "Persons who wish to intervene in the proceeding for this application, or who wish to provide their comments concerning this application, should contact the Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326, or call (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may call (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989."

(C) Proof of notice. Within five commission working days from the filing of the application limited to establishing or adjusting a PCRF, the utility shall file proof in the form of an affidavit that it complied with this paragraph.

(2) If a utility applies to reconcile a PCRF in a base-rate proceeding, the appropriate method and proof of notice set forth in §22.51 of this title (relating to Notice for Public Utility Regulatory Act, Chapter 36, Subchapters C - E; Chapter 51, §51.009; and Chapter 53, Subchapters C - E, Proceedings) shall apply. The notice shall include a description of the requested change to the PCRF.

(3) If a utility applies to reconcile a PCRF outside of a base-rate proceeding, the method of notice set forth in §25.235(b)(1)(B) of this title (relating to Fuel Costs-General) shall apply. The proof of notice set forth in §25.235(b)(3) of this title shall apply. The notice shall include a description of the requested reconciliation of the PCRF.

(e) Procedural schedule. Upon the filing of an application limited to the annual adjustment of a PCRF pursuant to this section, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows, except where good cause supports a different procedural schedule:

(1) within 60 days after a sufficient application was filed, if no hearing is requested within 30 days of the filing of the application; or

(2) within 120 days after a sufficient application was filed, if a hearing is requested within 30 days of the filing of the application. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application was filed.

(f) Exclusion from fuel factor. Purchased power costs that are recovered through a PCRF shall be excluded in calculating the utility's fixed fuel factor as defined in §25.237 of this title (relating to Fuel Factors).

(g) PCRF formula.

(1) The PCRF for each rate class shall be calculated using the following formula: $PCRF = \{\{(PPC_{CY} + APC_{M}) * TRAF_{CY} * CAF_{CY}\} - \{(PPC_{RC\ CLASS} + APC_{RC\ CLASS}) * (CBD_{CY} / CBD_{RC})\} - \{((PCIC_{RC\ CLASS} * ROR_{AT}) + PCDEP_{RC\ CLASS} + PCFIT_{RC\ CLASS} + PCOT_{RC\ CLASS}) * ((CBD_{CY} - CBD_{RC}) / CBD_{RC})\} + CTU\} / CBD_{F}$. Where: PPC_{CY} = Cost-year purchased power capacity costs from entities that are not affiliates, in accordance with subsection (c)(2) of this section. APC_{M} = The lesser of purchased power capacity costs from affiliates used to set base rates in the utility's last comprehensive base-rate proceeding, or cost-year purchased power capacity costs from affiliates. $TRAF_{CY}$ = Cost-year value of the Texas retail jurisdiction production demand allocation factor, using the same type of production demand allocation factor used to set rates in the utility's last comprehensive base-rate proceeding. CAF_{CY} = Cost-year value of the corresponding rate class production demand allocation factor, using the same type of production demand allocation factor used to set rates in the utility's last comprehensive base-rate proceeding. $PPC_{RC\ CLASS}$ = Purchased power capacity costs from entities that are not affiliates, in accordance with subsection (c)(2) of this section, allocated to the rate class and used to set base rates from the utility's last comprehensive base-rate proceeding. $APC_{RC\ CLASS}$ = Purchased power capacity costs from affiliates allocated to the rate class and used to set base rates from the utility's last comprehensive base-rate proceeding. CBD_{CY} = Cost-year rate class billing determinants. CBD_{RC} = Rate class billing determinants used to calculate base rates from the utility's last comprehensive base-rate proceeding. $PCIC_{RC\ CLASS}$ = Net production capacity invested capital allocated to the rate class from the utility's last comprehensive base-rate proceeding. ROR_{AT} = The after-tax rate of return from the utility's last comprehensive base-rate proceeding. $PCDEP_{RC\ CLASS}$ = Depreciation expense, as related to gross production capacity, allocated to the rate class from the utility's last comprehensive base-rate proceeding. $PCFIT_{RC\ CLASS}$ = Federal income tax, as related to net production capacity invested capital, allocated to the rate class from the utility's last comprehensive base-rate proceeding. $PCOT_{RC\ CLASS}$ = Other taxes, as related to net production capacity invested capital, allocated to the rate class from the utility's last comprehensive base-rate proceeding, and not including municipal franchise fees. CTU = The rate class under/(over)-recovery, including interest,

as calculated in subsection (h) of this section. CBD_E = Estimated PCRF rate year class billing determinants.

(2) Where the cost-year used in setting a PCRF includes a change in base rates due to a comprehensive base-rate proceeding, parameters in the PCRF formula that refer to values from the utility's last comprehensive base-rate proceeding shall be calculated by prorating the values from the relevant base rate-proceedings across the cost-year.

(h) True-up. After establishment of an initial PCRF, a subsequent PCRF cost-year is expected to contain portions of two different PCRF rate years. Therefore, for purposes of calculating class over- or under-recoveries for use in a proceeding to adjust the PCRF, previous PCRF revenue requirements from PCRF rate years in effect during the cost-year shall be prorated across the cost-year. For each rate class, the difference between the prorated cost-year PCRF revenue requirement that previous PCRFs were set to recover from that class and the actual cost-year PCRF revenues recovered from that class along with any net revenues from off-system sales allocated to that class as calculated in accordance with subsection (i) of this section, with interest on the balance calculated at the rate established annually by the commission pursuant to §25.28(c) and (d) of this title (relating to Bill Payment and Adjustments), shall be credited or charged to that class when calculating the adjusted PCRF. In the event that a PCRF rider is terminated, any over- or under-recovery amounts, with interest applied, shall be included in a separate rider.

(i) Off-system sales. Any margins from wholesale power capacity sales transactions shall be allocated and credited to customer classes to the extent that such sales exceed the amount of capacity and firm energy sales revenue credits used to set base rates in the utility's last comprehensive base-rate proceeding. The cost-year class allocation factor (CAF_{cy}) shall be used in allocating such excess revenues.

(j) Reconciliation of PCRF expenses.

(1) The reasonableness and necessity of expenses recovered through the PCRF shall be reviewed, and such costs and corresponding PCRF revenues shall be reconciled, as part of any proceeding initiated under §25.236(b) of this title (relating to Recovery of Fuel Costs). Upon motion and showing of good cause, a PCRF reconciliation proceeding may be severed from or consolidated with other proceedings.

(2) In a proceeding in which PCRF costs are being reconciled, the electric utility has the burden of showing that:

(A) its expenses recovered through the PCRF during the reconciliation period were reasonable and necessary expenses incurred to provide reliable electric service to retail customers; and

(B) it has properly accounted for the amount of purchased power capacity-related revenues collected pursuant to the PCRF and corresponding to costs reviewed during the reconciliation period.

(3) Any refunds or surcharges resulting from a PCRF reconciliation, with interest applied, shall, in the annual PCRF proceeding immediately subsequent to the filing of the final order in the reconciliation proceeding, be incorporated into the true-up balances described in subsection (h) of this section. In the event that a PCRF rider is terminated, such refunds or surcharges, with interest applied, shall be included in a separate rider.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205968
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 936-7223

♦ ♦ ♦

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 61. COMBATIVE SPORTS

16 TAC §§61.30, 61.40, 61.41, 61.47

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 61, §§61.30, 61.40, 61.41, and 61.47, regarding the combative sports program. The proposed rule amendments are necessary to implement changes recommended by the Medical Advisory Committee at its meeting on October 26, 2012, and by Department staff to update and clarify existing rules to improve the regulation of the industry.

The amendment to §61.30(n)(1)(C) is proposed to ensure that a rendered decision shall not be changed after a contest is final unless the winner of a bout tested positive for a prohibited substance not only immediately after the bout but also before the bout. This amendment is proposed to reflect current compliance drug testing procedures and to expand the time frame during which a drug test may be administered. The proposed amendment to §61.40(b)(8) makes it clear that a combative sports promoter must provide a sufficient number of seats in a department-designated area located in close proximity to the technical zone for use by individuals who are authorized by the Department to either work or attend a combative sports event. The proposed amendment will ensure that all authorized attendees will have seating during bouts. The proposed amendment to §61.40(d)(10) clarifies that "gross receipts taxes" rather than "gross receipts" are calculated as 3% of the face value of all tickets sold plus 3% of the face value of all complimentary tickets issued in excess of 25%.

Proposed amendments to §61.41 clarify the referee count procedure for knock-downs and conform to the guidelines adopted by the Association of Boxing Commissions to ensure that knockdown rules for title bouts are uniform. Proposed amendments to §61.47(p) and (q) authorize the executive director to direct a contestant to provide not only a urine sample but also a blood test before or after a bout and clarify that a positive test may result in administrative sanctions or monetary penalties or both.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed rules are in effect there will be no foreseeable implications relating to cost or revenues of state or local government as a result of enforcing or administering the proposed rules.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect the public benefit will be that the proposed rules will provide greater clarity and, therefore, certainty in the administration of the combative sports program. In addition, expanding the type and timing of drug testing will deter contestants from using banned substances and will also ensure that contestants who do not use banned

substances will not be placed at a competitive disadvantage to contestants who use banned substances.

There will be no economic effect on small or micro-business or to persons who are required to comply with the rules as proposed under Texas Government Code, Chapter 2006. The agency has also determined that the rules will have no adverse economic effect on small businesses. Preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code, §2006.002, is not required.

Comments on the proposal may be submitted by mail to Shanna Dawson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2052, which authorize the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1602. No other statutes, articles, or codes are affected by the proposal.

§61.30. Responsibilities and Authority of the Executive Director.

(a) - (m) (No change.)

(n) A decision rendered after a contest is final and shall not be changed unless:

(1) following the rendition of a decision the executive director determines that any one of the following occurred:

(A) the compilation of the score card of the judges shows an error which would mean that the decision was given to the wrong contestant;

(B) there was a violation of the laws or rules and regulations governing combative sports which affected the result of any bout; or

(C) the winner of a bout tested positive immediately before or after the bout for a substance listed in §61.47(q).

(2) If the executive director determines that any of paragraph (1)(A) - (C) occurred with regards to any bout then the decision rendered shall be changed as the executive director may direct.

(o) - (q) (No change.)

§61.40. Responsibilities of the Promoter.

(a) (No change.)

(b) A promoter shall:

(1) - (7) (No change.)

(8) Provide a sufficient number of seats in a department-designated area located in close proximity to the technical zone for use by ring officials and other individuals authorized and/or assigned by the department to work or attend the event.

(9) - (19) (No change.)

(c) (No change.)

(d) Tickets

(1) - (9) (No change.)

(10) Gross receipts taxes shall be calculated as 3% of the face value of all tickets sold plus 3% of the face value of all complimentary tickets issued in excess of 25%.

(11) (No change.)

(e) - (f) (No change.)

§61.41. Responsibilities of the Referee.

(a) - (j) (No change.)

(k) Knock-downs.

(1) - (3) (No change.)

(4) The mandatory eight count after knock downs will be the standard procedure in all bouts.

~~[(4) A contestant who is knocked down shall not be allowed to resume until the referee has finished counting to eight.]~~

(5) If a contestant who is knocked down rises before the count of ten and goes down again without being struck, the referee shall resume the count where he stopped.

(6) A contestant who has been knocked down cannot be saved by the bell in any round, including the last one.

~~[(6) When a round ends before a contestant who was knocked down rises, the bell shall not ring, and the count shall continue. If the contestant rises before the count of ten, the bell shall ring ending the round.]~~

(7) - (9) (No change.)

(l) - (p) (No change.)

§61.47. Responsibilities of Contestants.

(a) - (o) (No change.)

(p) A person who applies for or holds a license as a contestant shall provide a urine specimen or blood sample or both for drug testing either before or after the bout, if directed by the executive director or his designee. The applicant or licensee is responsible for paying the costs of the drug screen.

(q) A positive test (which has been confirmed by a laboratory authorized by the executive director or his designee) for any of the following substances shall be conclusive evidence of a violation of subsection (o) and may result in administrative sanctions or monetary penalties or both:[.]

(1) Stimulants

(2) Narcotics

(3) Cannabinoids (marijuana)

(4) Anabolic agents (exogenous and endogenous)

(5) Peptide hormones

(6) Masking agents

(7) Diuretics

(8) Glucocorticosteroids

(9) Beta--2 agonists (asthma medications)

(10) Anti-estrogenic agents

(11) Alcohol

(r) - (u) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205966
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 475-4879

♦ ♦ ♦

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 17. RESOURCE PLANNING

SUBCHAPTER B. BOARD APPROVAL

19 TAC §17.13

The Texas Higher Education Coordinating Board proposes an amendment to §17.13, concerning approval considerations for capital projects. The cost of higher education is a primary concern not only in the State of Texas, but nationally as well. A significant portion of the cost to students is in the form of student fees. Many institutions finance capital projects using student fees, which can remain in place for many years. Therefore, the short and long term impact of the increased cost related to capital construction must be subject to the scrutiny of the Texas Higher Education Coordinating Board to fulfill its role as identified in Texas Education Code, Chapter 61.

Specifically, this amendment will facilitate the Board's consideration of direct financial impact to the student in regards to the capital development process. Further, it permits the Board to consider the involvement of the student body when any fee will increase the total cost of education to all students.

Ms. Susan Brown, Assistant Commissioner for Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient and effective administration of the capital project approval process. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed, but the proposal has the potential to help contain the costs of higher education. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752, gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §61.0572 and §61.058.

The amendment affects Texas Education Code, §61.0572 and §61.058.

§17.13. Approval Considerations.

(a) - (d) (No change.)

(e) The Board may consider the financial impact of the project on students.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205953
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6127

♦ ♦ ♦

SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.20

The Texas Higher Education Coordinating Board proposes an amendment to §17.20, concerning project approval criteria for capital projects. The cost of higher education is a primary concern not only in the State of Texas, but nationally as well. A significant portion of the cost to students is in the form of student fees. Many institutions finance capital projects using student fees, which can remain in place for many years. Therefore, the short and long term impact of the increased cost related to capital construction must be subject to the scrutiny of the Texas Higher Education Coordinating Board to fulfill its role as identified in Texas Education Code, Chapter 61.

Specifically, this amendment creates a standard which limits the direct financial impact on students to seventy-five percent of the total project cost for any given project. In doing so, this simply creates the circumstance where increased scrutiny is placed on any project for which the students will directly be assessed a fee.

Ms. Susan Brown, Assistant Commissioner for Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient and effective administration of the capital project approval process. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner for Planning and Accountability, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752, gary.john-

stone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §61.0572 and §61.058.

The amendment affects Texas Education Code, §61.0572 and §61.058.

§17.20. Criteria for Approval of Projects.

Projects considered for approval shall meet the following criteria:

(1) - (2) (No change.)

(3) If any [~~the~~] project causes an increase in student fees, under no circumstances shall student fees account for more than seventy-five percent of the total project cost and the institution must certify such increases are executed in accordance with the applicable laws concerning approval by the student body.

(4) - (12) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205954
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 24, 2013
For further information, please call: (512) 427-6127

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.24

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to §153.24, concerning Complaint Processing. The amendments are proposed to clarify that receipt of a complaint intake form by the TALCB does not constitute the filing of a formal complaint against the individual named on the complaint intake form, to clarify all of the information that a respondent must provide to the TALCB following notification of receipt of a complaint intake form, to establish a timeframe for completion of a preliminary review to determine if a violation occurred, and to set out the criteria and procedure for a contingent dismissal and filing of a formal complaint by the TALCB.

Kerri T. Galvin, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the amended section. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the amended section. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Galvin also has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended section will be greater clarity and transparency about complaint processing at the TALCB.

Comments on the proposal may be submitted to Kerri T. Galvin, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1103.151, which authorizes the TALCB to adopt rules relating to certificates and licenses and §1103.154, which authorizes the TALCB to adopt rules relating to the professional conduct of a licensed or certified appraiser.

The statute affected by the amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed amendments.

§153.24. Complaint Processing.

(a) Receipt of a Complaint Intake Form by the board does not constitute the filing of a formal complaint by the board against the individual named on the Complaint Intake Form. [~~A complaint must be in writing and must be signed by the complainant. Board staff may initiate a complaint.~~]

[~~(1)~~] Upon receipt of a signed Complaint Intake Form [~~complaint~~], staff shall:

(1) [~~(A)~~] assign the complaint a case number in the complaint tracking system; and

(2) [~~(B)~~] send written acknowledgement of receipt to the complainant.

(b) [~~(2)~~] If the staff determines at any time that the complaint is not within the board's [~~Board's~~] jurisdiction or that no violation exists, the complaint shall then be dismissed with no further processing. The board [~~Board~~] or the commissioner may delegate to board [~~Board~~] staff the duty to dismiss complaints.

(c) [~~(3)~~] A complaint alleging mortgage fraud or in which mortgage fraud is suspected:

(1) [~~(A)~~] may be investigated covertly; and

(2) [~~(B)~~] shall be referred to the appropriate prosecutorial authorities.

(d) [~~(4)~~] Staff may request additional information necessary to determine how to proceed with the complaint from any person.

(e) [~~(5)~~] As part of a preliminary review, a [~~A~~] copy of the Complaint Intake Form [~~complaint~~] and all supporting documentation shall be sent to the respondent unless the complaint qualifies for covert investigation and the Standards and Enforcement Services Division deems covert investigation appropriate.

(f) [~~(6)~~] The respondent shall submit a response within 20 days of receiving a copy of the Complaint Intake Form [~~complaint~~]. The 20-day period may be extended for good cause upon request in writing or by e-mail.

[~~(A)~~] The response shall include the following:

(1) a copy of the appraisal report that is the subject of the complaint;

(2) [(i)] a copy of the respondent's work file associated with the appraisal(s) listed in the complaint, with the following signed statement attached to the work file(s): I SWEAR AND AFFIRM THAT EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORK FILE, AND NOTHING HAS BEEN ADDED TO OR REMOVED FROM THIS WORK FILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE;

(3) [(ii)] a narrative response to the complaint, addressing each and every item in the complaint [element thereof];

(4) [(iii)] a list of any and all persons known to the respondent to have actual knowledge of any of the matters made the subject of the complaint and, if in the respondent's possession, contact information; [and]

[(iv) the following statement in the letter transmitting the response: EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THE COPY OF EACH AND EVERY APPRAISAL WORK FILE ACCOMPANYING THIS RESPONSE IS A TRUE AND CORRECT COPY OF THE ACTUAL WORK FILE, AND NOTHING HAS BEEN ADDED TO OR REMOVED FROM THIS WORK FILE OR ALTERED AFTER PLACEMENT IN THE WORK FILE.]

(5) [(B)] any [Any supporting] documentation that supports respondent's position that was not in the work file, as long as it is [must be] conspicuously labeled as non-work file documentation [such] and kept separate from the work file.

[(C)] The respondent may also address other matters not raised in the complaint that the respondent believes need explanation; and [likely to be raised and may be supported by documentation contained in the work file.]

(6) a signed, dated and completed copy of any questionnaire sent by board staff.

(g) Staff will evaluate the complaint within three months of receipt of the response from respondent to determine whether sufficient evidence of a potential violation of TALCB's statutes or rules, or the Uniform Standards of Professional Appraisal Practice (USPAP) exists to pursue investigation and possible formal disciplinary action. If the staff determines that no violation exists, or there is insufficient evidence to prove a violation, the complaint shall be dismissed with no further processing. If one or more violations exist that staff determines are remediable and do not constitute evidence of a serous inability or unwillingness to comply with board statutes, rules and USPAP and the respondent has had no prior warning letters, contingent dismissals or formal disciplinary action by the board, staff may issue a non-disciplinary warning letter or offer a contingent dismissal agreement to the respondent depending on the nature of the violations.

(h) The terms of a contingent dismissal agreement will be in writing and agreed to by all parties. If respondent completes all requirements (e.g. remedial education, mentorship, re-examination, etc.) set out in the agreement within a certain prescribed period of time, the complaint will be dismissed with a non-disciplinary warning letter.

(i) [(7)] If the [The] complaint is not dismissed, including contingent dismissal, a formal complaint will [shall] be opened and it will be [assigned to a staff investigator and shall be] investigated by a [the] staff investigator or peer investigative committee, as appropriate. Staff may also open a formal complaint on its own motion. A written notice that a formal complaint has been opened will be sent to the complainant and respondent.

(j) [(8)] The staff investigator or peer investigative committee assigned to investigate a formal complaint shall prepare a report detailing its findings on a form approved by the board [Board] for that purpose. Reports prepared by a peer investigative committee shall be reviewed by the Standards and Enforcement Services Division, which shall determine the appropriate disposition of the complaint.

(k) [(9)] In determining the proper disposition of a complaint, and subject to the maximum penalties authorized under Texas Occupations Code, [Tex. Occ. Code] §1103.552, staff shall consider the following penalty matrix:
Figure: 22 TAC §153.24(k)
[Figure: 22 TAC §153.24(9)]

(1) [(A)] For the purposes of the above matrix, a person will not be considered to have had a prior occurrence unless the board [Board] had taken final action against the person before the date of the appraisal that led to the subsequent disciplinary action.

(2) [(B)] In addition to the guidelines outlined in the matrix, staff may recommend any or all of the following:

(A) [(i)] reducing or increasing the recommended penalty based on documented factors that support the deviation, including but not limited to the number or seriousness of the violation(s) and degree of harm to the public;

(B) [(ii)] probating all or a portion of a sanction or administrative penalty for a period not to exceed five years;

(C) [(iii)] requiring additional reporting requirements; and

(D) [(iv)] such other recommendations, with documented support, as will achieve the purposes of the Act, the Rules, and/or USPAP.

(l) [(10)] Agreed resolutions of complaint matters pursuant to Texas Occupations Code, [Tex. Occ. Code] §1103.458 or §1103.459 must be signed by the respondent, a representative of the Standards and Enforcement Services Division, and the commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205922
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

CHAPTER 155. RULES RELATING TO STANDARDS OF PRACTICE

22 TAC §155.2

The Texas Appraiser Licensing and Certification Board (TALCB) proposes new §155.2, concerning Work Relating to Property Tax Protests. The new rule is proposed to clarify when the Uniform Standards of Professional Appraisal Practice (USPAP) ap-

ply to work prepared by the TALCB licensees for the purposes of a property tax protest and require disclosure by the TALCB licensees that are dually licensed or certified as property tax consultants, whenever they perform work for the purposes of a property tax protest under their authority as a property tax consultant.

Kerri T. Galvin, General Counsel, has determined that for the first five-year period the proposed new section is in effect there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the section. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the section. There is no significant anticipated economic cost to persons who are required to comply with the proposed new section.

Ms. Galvin also has determined that for each year of the first five years the proposed new section is in effect the public benefit anticipated as a result of enforcing the section will be conformity with statutory provisions.

Comments on the proposal may be submitted to Kerri T. Galvin, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The new section is proposed under Texas Occupations Code, §1103.154, which authorizes the TALCB to adopt rules relating to the professional conduct of a licensed or certified appraiser.

The statute affected by the new section is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the proposed new section.

§155.2. Work Relating to Property Tax Protests.

(a) The preparation of a report or other work performed as part of any property tax consulting services on behalf of another person used to protest an unequal appraisal under Chapter 41, Subchapter C or Chapter 42, Subchapter B of the Tax Code, is considered an appraisal or appraisal practice for the purposes of §155.1(a) of this chapter (relating to Standards of Practice) and must conform with Uniform Standards of Professional Appraisal Practice (USPAP), if the person preparing the report or other work presents it as the product of a person licensed, certified, registered, or approved under the Texas Appraiser Licensing and Certification Act.

(b) A person licensed, certified, registered, or approved under the Texas Appraiser Licensing and Certification Act who is also certified as a property tax consultant under Chapter 1152 of the Tax Code, must include the USPAP disclaimer set out in subsection (c) of this section whenever that person prepares a report or other work used to protest unequal appraisal under Chapter 41, Subchapter C or Chapter 42, Subchapter B of the Tax Code, solely under the authority of a property tax consultant certification.

(c) The USPAP disclaimer required under this section must:

(1) be located directly above the preparer's signature;

(2) be in at least 10-point boldface type; and

(3) read as follows: USPAP DISCLAIMER: I AM LICENSED OR CERTIFIED AS A REAL PROPERTY APPRAISER AND A PROPERTY TAX CONSULTANT. THIS REPORT WAS PREPARED IN MY CAPACITY AS A PROPERTY TAX CONSULTANT AND MAY NOT COMPLY WITH THE REQUIREMENTS FOR DEVELOPMENT OF A REAL PROPERTY APPRAISAL CONTAINED IN THE UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (USPAP) OF THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205923
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

CHAPTER 157. RULES RELATING TO PRACTICE AND PROCEDURE

SUBCHAPTER B. CONTESTED CASE HEARINGS

22 TAC §157.10

The Texas Appraiser Licensing and Certification Board (TALCB) proposes amendments to §157.10, concerning Right to Counsel; Right to Participate. The amendments are proposed to clarify who is responsible for the cost of hearing transcripts, when ordered by a party or an Administrative Law Judge. The Texas Appraiser Licensing and Certification Act and the State Office of Administrative Hearings (SOAH) rules currently provide that the party who orders a transcript bears the cost of that transcript but is silent about what happens when a SOAH judge orders a transcript. This amendment will alleviate confusion and additional negotiations over who is the responsible party and/or possible duplication of costs.

Kerri T. Galvin, General Counsel, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the amended section. There is no anticipated significant impact on small businesses, micro-businesses or local or state employment as a result of implementing the amended section. There is no significant anticipated economic cost to persons who are required to comply with the proposed amendments.

Ms. Galvin also has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended section will be greater clarity.

Comments on the proposal may be submitted to Kerri T. Galvin, General Counsel, Texas Appraiser Licensing and Certification Board, P.O. Box 12188, Austin, Texas 78711-2188 or to general.counsel@talcb.texas.gov. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Chapter 1104 regarding appraisal management companies and §1103.512 regarding Record of Proceedings.

The statutes affected by the amendments are Texas Occupations Code, Chapters 1103 and 1104. No other statute, code or article is affected by the proposed amendments.

§157.10. Right to Counsel; Right to Participate.

(a) All parties, at their own expense, may be represented by counsel, which right may be expressly waived. Parties are entitled to respond and present evidence and argument on all issues involved, and to conduct cross examinations for full and true disclosure of the facts.

(b) Costs of a transcript of a SOAH proceeding ordered by a party shall be paid by that party. Costs of a transcript of a SOAH proceeding ordered by the judge shall be split equally between the parties.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205924
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 361. ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §361.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to 22 TAC §361.1 (Board Rule §361.1) which sets forth the definitions of certain terms and words used in Title 8, Chapter 1301 of the Texas Occupations Code (Plumbing License Law) and Board Rules.

The proposed change to Board Rule §361.1(19) clarifies the language of the rule by stating that registrants with endorsements are also subject to continuing professional education requirements.

The proposed change to Board Rule §361.1(23) adds Plumbing Inspectors to the category of licensees qualified to hold an endorsement.

The proposed change to Board Rule §361.1(30) adds Plumbing Inspectors in the category of licensees entitled to hold a medical gas piping endorsement.

The proposed new Board Rule §361.1(31) adds Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement to the endorsements issued by the Board. The remaining paragraphs have been renumbered accordingly.

The proposed change to Board Rule §361.1(37) adds multipurpose residential fire protection sprinklers in the definition of plumbing. This paragraph has been renumbered Board Rule §361.1(38).

The proposed change to Board Rule §361.1(39) expands the definition of plumbing inspection to include multipurpose residential fire protection sprinkler systems. This paragraph has been renumbered Board Rule §361.1(40).

These revisions were identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendments are in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of the rule amendments.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be clearer. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendments to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendments to Board Rule §361.1 are proposed under and affect Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by the proposed amendments.

§361.1. Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

(1) Act--The Plumbing License Law, Title 8, Chapter 1301, Occupations Code, as amended.

(2) Administrative Act--The Administrative Procedure Act, the Texas Government Code, §2001.001, et seq, as amended.

(3) Administrator--The Board-appointed executive director of all Board staff.

(4) Adopted Plumbing Code--A plumbing code, including a fuel gas code adopted by the Board or a political subdivision, including any city, town, village, municipality, public water system, municipal utility district, in compliance with §1301.255 and §1301.551 of the Plumbing License Law.

(5) Advisory Committee--A Board appointed committee subject to §1301.258 of the Plumbing License Law, §361.12 of the Board Rules and Chapter 2110 of the Texas Government Code, of which the primary function is to advise the Board.

(6) Appliance Connection--An appliance connection procedure using only a code approved appliance connector that does not require cutting into or altering the existing plumbing system.

(7) Applicant--An individual seeking to obtain a License, Registration or Endorsement.

(8) Board--The Texas State Board of Plumbing Examiners.

(9) Board Member--An individual appointed by the governor and confirmed by the senate to serve on the Board.

(10) Building Sewer--The part of the sanitary drainage system outside of the building, which extends from the end of the building drain to a public sewer, private sewer, private sewage disposal system, or other point of sewage disposal.

(11) Certificate of Insurance--A form submitted to the Board certifying that the Responsible Master Plumber carries insurance coverage as specified in §1301.522 of the Plumbing License Law and §367.3 of the Board Rules.

(12) Chief Examiner--An employee of the Board who, under the direction of the Administrator, coordinates and supervises the activities of the Board examinations and registrations.

(13) Chief Field Representative--The Director of Enforcement who is an employee of the Board who meets the definition of "Field Representative" and, under the direction of the Executive Director, coordinates and supervises the activities of the Field Representatives.

(14) Cleanout--A fitting, other than a p-trap, approved by the adopted plumbing code and designed to be installed in a sanitary drainage system to allow easy access for cleaning the sanitary drainage system.

(15) Code-Approved Appliance Connector--A semi-rigid or flexible assembly of tube and fittings approved by the adopted plumbing code and designed for connecting an appliance to the existing plumbing system without cutting into or altering the existing plumbing system.

(16) Code Approved Existing Opening--For the purposes of drain cleaning activities described in §1301.002(3) of the Plumbing License Law, a code approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code.

(17) Complaint--A written charge alleging a violation of state law, Board rules or orders, local codes or ordinances, or standards of competency; or the presence of fraud, false information, or error in the attempt to obtain a License, Registration or Endorsement.

(18) Contested Case--A proceeding, including but not limited to rulemaking, licensing and registering, in which the agency determines the legal right, duties, and privileges of a party after allowing an opportunity for adjudicative hearing of the case.

(19) Continuing Professional Education--Board-approved courses/programs required for a licensee or registrant with an endorsement to renew his or her License, Registration and/or Endorsement.

(20) Direct Supervision--

(A) The on-the-job oversight and direction of a Registered Plumber's Apprentice performing plumbing work by a licensed plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(i) that the plumbing materials for the job are properly prepared prior to assembly according to the material manufacturers recommendations and the requirements of the adopted plumbing code; and

(ii) that the plumbing work for the job is properly installed to protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(B) The on-the-job oversight and direction by a licensed Plumbing Inspector of an individual training to qualify for the Plumbing Inspector Examination.

(C) For plumbing work performed only in the construction of a new one-family or two-family dwelling in an unincorporated area of the state, a Responsible Master Plumber is not required to provide for the continuous or uninterrupted on-the-job oversight of a Registered Plumber's Apprentice's work by a licensed plumber, however, the Responsible Master Plumber must:

(i) provide for the training and management of the Registered Plumber's Apprentice by a licensed plumber;

(ii) provide for the review and inspection of the Registered Plumber's Apprentice's work by a licensed plumber to ensure compliance with subparagraph (A)(i) and (ii) of this paragraph; and

(iii) upon request by the Board, provide the name and plumber's license number of the licensed plumber who is providing on-the-job training and management of the Registered Plumber's Apprentice and who is reviewing and inspecting the Registered Plumber's Apprentice's work on the job, or the name and plumber's license number of the licensed plumber who trained and managed the Registered Plumber's Apprentice and who reviewed and inspected the Registered Plumber's Apprentice's work on a job.

(21) Drain Cleaner--An individual who has completed at least 4,000 hours working under the supervision of a Responsible Master Plumber as a registered Drain Cleaner-Restricted Registrant, who has fulfilled the requirements of and is registered with the Board, and who installs cleanouts and removes and resets p-traps to eliminate obstructions in building drains and sewers.

(22) Drain Cleaner-Restricted Registrant--An individual who has worked as a registered Plumber's Apprentice under the supervision of a Responsible Master Plumber, who has fulfilled the requirements of and is registered with the Board, and who clears obstructions in sewer and drain lines through any code-approved existing opening.

(23) Endorsement--A certification issued by the Board in addition to the Master, Plumbing Inspector, or Journeyman Plumber License.

(24) Field Representative--For the purposes of the Board Rules:

(A) "Field Representative" means an employee of the Board who is:

(i) knowledgeable of this Act and of municipal ordinances relating to plumbing;

(ii) qualified by experience and training in good plumbing practice and compliance with this Act;

(iii) designated by the Board to assist in the enforcement of this Act and rules adopted under this Act; and

(iv) licensed by the Board as a plumber.

(B) A field representative may:

(i) make on-site license and registration checks to determine compliance with this Act;

(ii) investigate consumer complaints filed under §1301.303 of the Plumbing License Law;

(iii) assist municipal plumbing inspectors in cooperative enforcement of this Act; and

(iv) issue citations as provided by §1301.502 of the Plumbing License Law.

(25) Journeyman Plumber--An individual licensed under this Act who has met the qualifications for registration as a Plumber's Apprentice or for licensure as a Tradesman Plumber-Limited Licensee, who has completed at least 8,000 hours working under the supervision of a Responsible Master Plumber, who supervises, engages in, or works at the actual installation, alteration, repair, service and renovating of plumbing, and who has successfully fulfilled the examinations and requirements of the Board.

(26) License--A document issued by the Board to certify that the named individual fulfilled the requirements of the Act and of the Board Rules to hold a license issued by the Board.

(27) Licensing and Registering--The process of granting, denying, renewing, revoking, or suspending a License, Registration or Endorsement.

(28) Maintenance Man or Maintenance Engineer--An employee, as opposed to an independent contractor, who performs plumbing maintenance work incidental to and in connection with other duties. "Incidental to and in connection with" includes the repair, maintenance and replacement of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters. "Incidental to and in connection with" does not include cutting into fuel gas plumbing systems and the installation of gas fueled water heaters. An individual who erects, builds, or installs plumbing not already in existence may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections. Such maintenance individuals shall not engage in plumbing work for the general public.

(29) Master Plumber--An individual licensed under this Act who is skilled in the design, planning, superintending, and the practical installation, repair, and service of plumbing, who is knowledgeable about the codes, ordinances, or rules and regulations governing those matters, who alone, or through an individual or individuals under his supervision, performs plumbing work, and who has successfully fulfilled the examinations and requirements of the Board.

(30) Medical Gas Piping [~~Installation~~] Endorsement--

(A) A document entitling the holder of a Master or Journeyman Plumber License to install piping that is used solely to transport gases used for medical purposes including, but not limited to oxygen, nitrous oxide, medical air, nitrogen, medical vacuum.

(B) A document entitling the holder of a Plumbing Inspector License to inspect medical gas and vacuum system installations.

(31) Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement--

(A) A document entitling the holder of a Master or Journeyman Plumber License to install a multipurpose residential fire protection sprinkler system in a one or two family dwelling.

(B) A document entitling the holder of a Plumbing Inspector License to inspect a multipurpose residential fire protection sprinkler system.

(32) [~~(31)~~] One Family Dwelling--A detached structure designed for the residence of a single family that does not have the characteristics of a multiple family dwelling, and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(33) [~~(32)~~] Party--Each person named or admitted in association with an action as a party.

(34) [~~(33)~~] Paid Directly--As related to §1301.255(e) of the Plumbing License Law, "paid" and "directly" have the common meanings and "paid directly" means that compensation for plumbing inspections must be paid by the political subdivision to the individual Licensed Plumbing Inspector who performed the plumbing inspections or the plumbing inspection business which utilized the plumbing inspector to perform the inspections.

(35) [~~(34)~~] Person--For the purposes of the Board Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency.

(36) [~~(35)~~] Petitioner--A person asking the Board to adopt a rule.

(37) [~~(36)~~] Plumber's Apprentice--Any individual other than a Master Plumber, Journeyman Plumber, or Tradesman Plumber-Limited Licensee who, as his or her principal occupation, is engaged in learning and assisting in the installation of plumbing, is registered by the Board, and works under the supervision of a licensed Responsible Master Plumber and the direct supervision of a licensed plumber.

(38) [~~(37)~~] Plumbing--All piping, fixtures, appurtenances, and appliances, including disposal systems, drain or waste pipes, multipurpose residential fire protection sprinkler systems or any combination of these that: supply, distribute, circulate, recirculate, drain, or eliminate water, gas, medical gasses and vacuum, liquids, and sewage for all personal or domestic purposes in and about buildings where persons live, work, or assemble; connect the building on its outside with the source of water, gas, or other liquid supply, or combinations of these, on the premises, or the water main on public property; and carry waste water or sewage from or within a building to the sewer service lateral on public property or the disposal or septic terminal that holds private or domestic sewage. The installation, repair, service, maintenance, alteration, or renovation of all piping, fixtures, appurtenances, and appliances on premises where persons live, work, or assemble that supply gas, medical gasses and vacuum, water, liquids, or any combination of these, or dispose of waste water or sewage.

(39) [~~(38)~~] Plumbing Company--A person, as defined in the Board Rules, who engages in the plumbing business.

(40) [~~(39)~~] Plumbing Inspection--Any of the inspections required in §1301.255 and §1301.551 of the Plumbing License Law, including any check of multipurpose residential fire protection sprinkler systems, pipes, faucets, tanks, valves, water heaters, plumbing fixtures and appliances by and through which a supply of water, gas, medi-

cal gasses or vacuum, or sewage is used or carried that is performed on behalf of any political subdivision, public water supply, municipal utility district, town, city or municipality to ensure compliance with the adopted plumbing and gas codes and ordinances regulating plumbing.

(41) [~~(40)~~] Plumbing Inspector--Any individual who is employed by a political subdivision or state agency, or who contracts as an independent contractor with a political subdivision or state agency, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has no financial or advisory interests in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Board.

(42) [~~(41)~~] Pocket Card--A card issued by the Board which certifies that the holder has a Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, Residential Utilities Installer Registration, Drain Cleaner Registration, Drain Cleaner-Restricted Registration or a Plumber's Apprentice Registration.

(43) [~~(42)~~] Political Subdivision--A political subdivision of the State of Texas that includes a:

(A) city;

(B) county;

(C) school district;

(D) junior college district;

(E) municipal utility district;

(F) levee improvement district;

(G) drainage district;

(H) irrigation district;

(I) water improvement district;

(J) water control improvement district;

(K) water control preservation district;

(L) freshwater supply district;

(M) navigation district;

(N) conservation and reclamation district;

(O) soil conservation district;

(P) communication district;

(Q) public health district;

(R) river authority; and

(S) any other governmental entity that:

(i) embraces a geographical area with a defined boundary;

(ii) exists for the purpose of discharging functions of government; and

(iii) possesses authority for subordinate self government through officers selected by it.

(44) [~~(43)~~] P-Trap--A fitting connected to the sanitary drainage system for the purpose of preventing the escape of sewer gasses from the sanitary drainage system and designed to be removed to allow for cleaning of the sanitary drainage system. For the purposes of drain cleaning activities described in §1301.002(2) of the Plumbing License Law, a p-trap includes any integral trap of a water closet, bidet, or urinal.

(45) [~~(44)~~] Public Water System--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals, but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater, at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if the individual lives in, uses as the individual's place of employment, or works in a place to which drinking water is supplied from the water system.

(46) [~~(45)~~] Regularly Employed--Steadily, uniformly, or habitually working in an employer-employee relationship with a view of earning a livelihood, as opposed to working casually or occasionally.

(47) [~~(46)~~] Residential Utilities Installer--An individual who has completed at least 2,000 hours working under the supervision of a Responsible Master Plumber as a registered Plumber's Apprentice, who has fulfilled the requirements of and is registered with the Board, and who constructs and installs yard water service piping for one family or two family dwellings and building sewers.

(48) [~~(47)~~] Respondent--A person charged in a complaint filed with the Board.

(49) [~~(48)~~] Responsible Master Plumber--A person licensed as a Master Plumber who:

(A) allows the person's Master Plumber license to be used by only one plumbing company for the purpose of offering and performing plumbing work under the person's Master Plumber license;

(B) is authorized to obtain permits for plumbing work; assumes responsibility for plumbing work performed under the person's license;

(C) has submitted a certificate of insurance as required by §1301.3576 of the Plumbing License Law and §367.3 of the Board Rules; and

(D) has completed and submitted a certificate of completion of a training program as required by §1301.3576 of the Plumbing License Law and §363.13 of the Board Rules.

(50) [~~(49)~~] Rule--An agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and not affecting private rights or procedures.

(51) [~~(50)~~] Supervision--The general on-the-job or off-the-job oversight, direction and management of plumbing work and individuals performing plumbing work by a Responsible Master Plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(A) that the operations of the plumbing company that has secured his or her services meets the requirements of all applicable local and state ordinances, regulations and laws; and

(B) that the plumbing work performed under his or her License will protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(52) [~~(51)~~] System--An interconnection between one or more public or private end users of water, gas, sewer, or disposal systems that could endanger public health if improperly installed.

(53) [~~(52)~~] Tradesman Plumber-Limited Licensee--An individual who has completed at least 4,000 hours working under the direct supervision of a Journeyman or Master Plumber as a registered Plumber's Apprentice, who has passed the required examination and fulfilled the other requirements of the Board, who constructs and installs plumbing for one family or two family dwellings under the supervision of a Responsible Master Plumber, and who has not met or attempted to meet the qualifications for a Journeyman Plumber License.

(54) [~~(53)~~] Two Family Dwelling--A detached structure with separate means of egress designed for the residence of two families ("duplex") that does not have the characteristics of a multiple family dwelling and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(55) [~~(54)~~] Water Supply Protection Specialist--A Master or Journeyman Plumber who holds the Water Supply Protection Specialist Endorsement issued by the Board.

(56) [~~(55)~~] Water Treatment--A business conducted under contract that requires experience in the analysis of water, including the ability to determine how to treat influent and effluent water, to alter or purify water, and to add or remove a mineral, chemical, or bacterial content or substance. The term also includes the installation and service of potable water treatment equipment in public or private water systems and making connections necessary to complete installation of a water treatment system.

(57) [~~(56)~~] Work as a Master Plumber--To act as and assume the responsibilities of a Responsible Master Plumber, as defined in this section.

(58) [~~(57)~~] Yard Water Service Piping--The building supply piping carrying potable water from the water meter or other source of water supply to the point of connection to the water distribution system at the building.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205955
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §361.12

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §361.12 (Board Rule §361.12) which concerns the Board's advisory committees.

The proposed amendment makes a citation to the current section of Chapter 1301 Texas Occupations Code (Plumbing License Law).

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be more accurate. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendment to Board Rule §361.12 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§361.12. Advisory Committees.

(a) The Board may appoint Advisory Committees as it considers necessary for the primary function of advising the Board.

(b) Advisory Committees are subject to Plumbing License Law §1301.258 [~~§5(f) of the Act~~] and [~~Chapter~~] §2110.008 of the Texas Government Code and shall:

(1) be composed of a reasonable number of members not to exceed 24 members who provide a balanced representation between:

(A) individuals regulated or directly affected by the Board; and

(B) consumers of services provided by the Board or the plumbing industry; and

(2) select from among its members a presiding officer who shall preside over the advisory committee and report to the Board; and

(3) serve without compensation or reimbursement.

(c) If the Board appoints an advisory committee, it shall adopt rules that:

(1) state the purpose of the committee;

(2) describe the task of the committee and the manner in which the committee will report to the Board; and

(3) the date on which the committee will automatically be abolished (not to exceed four years from its creation) unless the Board votes to continue the committee in existence.

(d) If the Board appoints an advisory committee it shall evaluate annually:

(1) the committee's work;

(2) the committee's usefulness; and

(3) the costs related to the committee's existence, including the cost of Board staff time spent in support of the committee's activities.

(e) The Board shall report to the Legislative Budget Board the information developed in the evaluation required in subsection (d) of this section. The Board shall file the report biennially in connection with the agency's request for appropriations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205956
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

CHAPTER 363. EXAMINATION AND REGISTRATION

22 TAC §363.11

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §363.11 (Board Rule §363.11) which sets forth the Endorsement Training Programs.

The proposed change to Board Rule §363.11 allows a Plumbing Inspector to take the Medical Gas Piping Installation endorsement examination after completing a training program approved by the Board that pertains to subject matter applicable to the installation of medical gas piping systems. The amendment also cites the latest edition of the National Fire Protection Association code for gas and vacuum systems.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be clearer. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendment to Board Rule §363.11 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§363.11. Endorsement Training Programs.

(a) General requirements for Course Providers and Course Instructors

(1) Any person who seeks to provide a training program as a prerequisite for qualifying to take an examination to obtain any endorsement issued by the Board may apply to the Board for approval as a Course Provider.

(2) Any person who seeks to provide instruction of such training programs must be employed by an approved Course Provider. He or she may apply to the Board through an approved Course Provider to be approved as a Course Instructor.

(A) Each Course Instructor must be:

(i) a licensed Journeyman or Master Plumber and hold the particular endorsement relevant to the training program that the Course Instructor will teach; or

(ii) a licensed Plumbing Inspector who has completed the training and examination requirements required to obtain the particular endorsement relevant to the training program that the Course Instructor will teach.

(B) Each Course Instructor will be required to successfully complete a Board approved instructor training program of 160 hours which meets the following criteria:

(i) 40 hours to provide the instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs;

(ii) 40 hours to provide the instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs;

(iii) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community; and

(iv) 40 hours to provide the instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(C) To maintain status as an approved Course Instructor of an endorsement training program, the Course Instructor shall undergo one of the instructor training programs required under subparagraph (B) of this paragraph every twelve (12) months such that the entire training (160 hours) is completed within four years.

(3) Course Providers and Course Instructors shall adhere to the instruction criteria approved by the Board in this section, and ensure that only students who receive the specified number of contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for completing the training required by this section.

(4) The training required by this section may be provided in increments, as appropriate, and the Course Provider or Course Instructor shall provide a certificate of completion to the student, upon completion of the training.

(A) The certificate of completion shall state:

(i) the title of the training program related to the particular endorsement;

(ii) the names of the Course Provider and Course Instructor;

(iii) the name and license number of the student; and

(iv) the date that the instruction was completed.

(B) The Course Provider shall maintain a record of the information contained on each certificate of completion for at least two years.

(5) Each Course Provider shall notify the Board at least seven (7) days before conducting training programs or electronically post notice of the class schedule on the provider's website at least seven (7) days before conducting a class. The notice shall contain the date(s), time(s) and place(s) where the class(es) will occur.

(6) Each Course Provider shall perform self-monitoring to ensure compliance with this section and reporting as required by the Board.

(7) The Board may monitor endorsement training programs to ensure compliance with this section.

(8) Any failure on the part of a Course Provider or Course Instructor to abide by the requirements of this section may result in the denial, probation, suspension, or revocation of Board approval as a Course Provider or Course Instructor.

(b) Medical Gas Piping Installation Endorsement training programs

(1) Before a Plumbing Inspector, Journeyman, or Master Plumber may qualify to take the Medical Gas Piping Installation endorsement examination, the applicant must complete a training program approved by the Board which pertains to subject matter applicable to the installation of medical gas piping systems. As a minimum, the training course shall be based on the standards contained in the latest edition of the National Fire Protection Association (NFPA) 99 Health Care Facilities Code [~~99C Gas and Vacuum Systems~~].

(2) Course Providers shall provide lesson plans for Board approval. Approved Course Providers of medical gas training shall furnish a program consisting of a classroom presentation of course material, a test of the enrollee's comprehension of the matter, a shop demonstration of the proper brazing procedures by the Course Instructor, and the enrollee's final brazing evidence to the instructor of an accepted vertical and horizontal practice coupon.

(A) A minimum of twenty four (24) hours shall be assigned for the classroom presentation and testing.

(B) In addition, a minimum of four (4) hours shall be assigned to the brazing demonstrations. The student enrolled in medical gas training will have completed a minimum of eight hours of practice brazing coupons in an equipped shop. These coupons will be presented to the Course Instructor for grading.

(C) The aforementioned hours represent the minimum requirements only; additional time may be included in each segment of the program.

(c) Water Supply Protection Specialist Endorsement training programs

(1) Before a Journeyman or Master Plumber may qualify to take the Water Supply Protection Specialist endorsement examination, the applicant must complete a training program approved by the Board, which pertains to subject matter applicable to the protection of public and private potable water supplies, as required by the plumbing codes, laws and regulations of this state.

(2) Any person wishing to offer a Board approved training program in Water Supply Protection Specialist Endorsement to the public must submit a course outline, together with the number of hours of instruction, to the Board for approval.

(3) The Board may require resubmission for approval of any previously approved Water Supply Protection Specialist endorsement training program to ensure that the program meets current requirements of the plumbing codes, laws, and regulations of the state which pertain to the protection of public and private potable water supplies.

(d) Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement training programs

(1) Before a Plumbing Inspector, Journeyman or Master Plumber may qualify to take the Multipurpose Residential Fire Protection Sprinkler System Inspector examination or Multipurpose Residential Fire Protection Sprinkler Specialist endorsement examination, the applicant must complete a training program which pertains to subject matter applicable to a multipurpose dwelling fire sprinkler system, as required by the National Fire Protection Association (NFPA) Standard 13D.

(2) The training program must incorporate the training criteria included in the American Society of Sanitary Engineering Series 7000, as it relates to plumbing-based residential fire protection systems installers for one and two family dwellings.

(3) The training program must be at least 24 hours in length, using the following minimum guidelines:

(A) 1 hour to review applicable standards, codes, and laws, including the Plumbing License Law, Board Rules and the fire sprinkler rules, 28 TAC §§34.701 [~~§§34.700~~] et seq., and their integration and identifying the enforcing authorities;

(B) 4 hours to study definitions, to identify as a minimum the various types, specific parts, specific terminology and concepts of the system;

(C) 4 hours to learn the acceptable type, material, location, limitation and correct installation of equipment including but not limited to pipe, fittings, valves, types of sprinkler heads, supports, drains, test connections, automatic by-pass valve, smoke alarm devices, other appurtenances;

(D) 2 hours to learn the acceptable type, configuration, and material which may or may not be required for a water supply including but not limited to backflow preventers, shut off valves, water meters, water flow detectors, tamper switches, test connections, pressure gages, minimum pipe sizes, storage tanks, and wells including the ability to perform a water flow test of a city water supply;

(E) 8 hours to learn which rooms require sprinklers and the correct positioning of a sprinkler head based on its type, listing, temperature rating, and the building structure including but not limited to understanding the concepts of the area of coverage, spacing, distance from walls and ceilings, listing limitations, dead air pockets, manufacturer's requirements and obtaining knowledge of how structural features such as flat, sloped, pocket, or open joist ceilings, close proximity to heat sources and other obstructions such as ceiling fans, surface mounted lights, beams, and soffits may adversely influence the location of a sprinkler head;

(F) 3 hours to learn critical hydraulic concepts for the installer that may adversely affect the original design plan due to field construction changes including but not limited to remote area sprinkler operation, flow versus pressure, elevation pressure loss, sprinkler K-factors, fixture units, minimum pipe diameters, additional pipe lengths and understand which household water appliances affect or do not affect the sprinkler hydraulics/performance; and

(G) 2 hours to learn the required testing, maintenance and documentation including but not limited to the final inspection and tests normally required by the local fire official (AHJ), when permits, working plans, as-built plans or hydraulic calculations are required and who provides for the system maintenance and instructions.

(4) Any person who holds a valid Master or Journeyman Plumber license issued by the Board and a valid RME-General or RME-Dwelling license issued by the State Fire Marshal's Office, Texas Department of Insurance, is exempted from completing the Multipurpose Residential Fire Protection Sprinkler Specialist Endorsement training program described by this section prior to taking the Multipurpose Residential Fire Protection Sprinkler Specialist endorsement examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205957
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §363.13

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §363.13 (Board Rule §363.13) which sets forth the Training Programs for Responsible Master Plumber Applicants.

The proposed change to Board Rule §363.13 would require a limit of 45 students to the Responsible Master Plumber Training Course.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be clearer. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment of this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@ts-bpe.state.tx.us.

The amendment to Board Rule §363.13 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§363.13. Training Program for Responsible Master Plumber Applicants.

(a) Before a Master Plumber acts as a Responsible Master Plumber, the Master Plumber must complete a Board approved training program which includes laws and rules applicable to the operation of a plumbing business in this state, as required by §1301.3576 of the Plumbing License Law.

(1) The requirements of this section do not apply to a Responsible Master Plumber who, on or before January 1, 2012, provides the Board with a Certificate of Insurance that meets the requirements of [~~this~~] Board Rule §367.3 (relating to Requirements for Plumbing Companies, Responsible Master Plumbers; Certificate of Insurance); and

(2) that is effective on January 1, 2012.

(b) The training program required under subsection (a) of this section, must be a minimum of 24 hours in length and include instruction in the following subjects applicable to the operation of a plumbing business in this state:

(1) finance;

(2) legal;

(3) local, state and federal rules and regulations;

(4) insurance/bonds, including workman's compensation insurance;

(5) Occupational Safety and Health Administration (OSHA) requirements awareness; and

(6) customer service.

(c) The Board will approve only Course Providers and Course Instructors who are approved to provide and instruct Continuing Professional Education (CPE) courses, under Board Rule §365.14 (relating to Continuing Professional Education Programs), to provide and instruct the classroom training required by this section, except that an approved Course Provider may utilize another government and/or education entity to provide the instruction through the approved Course Provider.

(d) Course Providers and Course Instructors may be approved to provide the classroom training required under this section without submitting a separate application in addition to the application required to be approved to provide and instruct CPE, under Board Rule §365.14 [~~of this title~~].

(1) Any Course Provider or Course Instructor whose approval to provide or instruct CPE courses under Board Rule §365.14 is suspended or revoked for any reason, is not approved to provide or instruct the classroom training required under this section.

(2) Course Providers and Course Instructors shall adhere to the instruction criteria in subsections (a) and (b) of this section, and ensure that only Master Plumbers who receive the specified number of contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for completing the training required by this section.

(3) Course Providers or Course instructors shall provide notice of intent to conduct training required by this section, in the same manner required by Board Rule §365.14(b)(10).

(4) Course Instructors shall abide by the same standards of conduct described in Board Rule §365.14(c), when providing the training required by this section.

(5) Course providers shall limit the number of students of any class to forty-five (45).

(e) The training required by this section may be provided in increments, as appropriate, and the Course Provider or Course Instructor shall provide a certificate of completion to the Master Plumber for each increment completed.

(1) The certificate of completion shall state:

(A) the names of the Course Provider and Course Instructor;

(B) the name and license number of the Master Plumber;

(C) the specific instruction and number of hours completed; and

(D) the date that the increment of instruction was completed.

(2) The Course Provider shall maintain a record of the information contained on each certificate of completion for at least six years.

(f) Prior to the date that the Master Plumber begins acting as a Responsible Master Plumber, the Master Plumber shall submit to the Board:

(1) a certificate or certificates of completion of the training required by this section; and

(2) a Certificate of Insurance as required by Board Rule §367.3.

(g) Providing false certificates of completion or any other false information to the Board may result in disciplinary action, as provided by the Plumbing License Law, Board Rules or other laws of this state.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205958
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

CHAPTER 365. LICENSING AND REGISTRATION

22 TAC §365.5

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §365.5 (Board Rule §365.5) so that it correctly cites the title of the latest edition of the National Fire Protection Association's code on gas and vacuum systems.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be more accurate. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by e-mail to info@tsbpe.state.tx.us.

The amendment to Board Rule §365.5 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§365.5. Renewals.

(a) The Board shall inform a licensee or registrant of the impending expiration of a license, registration or endorsement by sending written notice at least 30 days before its expiration date to the licensee's last known mailing address according to Board records.

(b) A licensee or registrant may renew an unexpired license, registration or endorsement before its expiration date by meeting all renewal requirements and paying the fee required by the Board.

(c) The licensee's or registrant's failure to receive the notice of expiration will not alter the licensee's or registrant's responsibility to renew the license or registration each year or endorsement every three years by its expiration date.

(d) Any Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee, Drain Cleaner, Drain Cleaner-Restricted Registrant, Residential Utilities Installer, or Plumbing Inspector wishing to renew a license or registration must have proof submitted to the Board of successful completion of the required continuing professional education (CPE) course or courses, subject to the additional requirement in subsection (e) of this section.

(e) Any license holder with a medical gas endorsement must complete a Board approved medical gas continuing professional education class within the three-year period of the endorsement. The classroom hours shall consist of instruction of the most current edition of the National Fire Protection Association (NFPA) 99 Health Care Facilities Code [~~99C, Standard on Gas and Vacuum Systems~~], and the changes therein. No license holder with a medical gas endorsement may count the same medical gas continuing professional education class twice towards meeting the continuing professional education requirements for renewal of the medical gas endorsement on a plumbing license.

(f) Any license or endorsement holder who lives in a county having no city with a population in excess of 100,000, or resides out of state, or who submits written proof to the Board from a physician stating the medical reason that the licensee is unable to attend a CPE class, may fulfill the continuing professional education requirements by completing a correspondence course approved by the Board.

(g) A person who holds a license and is:

(1) a member of the United States armed forces, a reserve component of the United States armed forces or the state military forces;

(2) is ordered to active duty by proper authority; and

(3) submits documentation acceptable to the Board which demonstrates the person was unable to renew the license in a timely manner due to the active duty service is:

(A) exempt from paying a late renewal fee; and

(B) entitled to an additional amount of time, equal to the total number of years or parts of years that the person serves on active duty, to complete any continuing education requirements and any other requirements related to the renewal of the person's license.

(h) Under §1301.404(f) of the Plumbing License Law, the following individuals may be credited as having fulfilled their continuing professional education (CPE) requirements for the current CPE course year, in order to renew a license issued by the Board:

(1) Any CPE Course Instructor who is fully approved under Board Rule §365.14 [~~of this chapter~~] (relating to Continuing Professional Education Programs); and

(2) any employee of the Board who:

(A) monitors a current CPE class for compliance with the Plumbing License Law and these sections; or

(B) reviews all approved Course Materials under Board Rule §365.14 [~~of this chapter~~] and completes the current Course Instructor Certification Workshop conducted by the Board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205959
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §365.8

The Texas State Board of Plumbing Examiners (Board) proposes amendments to 22 TAC §365.8 (Board Rule §365.8) that establishes the requirement that licensees or registrants inform the Board of changes to their name or mailing address.

The amendments require licensees and registrants to inform the Board of changes in primary employment annually, upon renewal of a license or registration. In addition to this change, the amendment gives licensees and registrants a period of thirty days to notify the Board of changes to their legal name and mailing address. These changes ensure that the Board maintains the most recent contact information for its licensees and registrants.

These revisions were identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendments are in effect, there will be no fiscal

impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of the rule amendments.

Ms. Hill has concluded that the public will benefit from the rule changes during each year of the first five-year period because it will have the most current contact information for individuals licensed and registered by the Board. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendments to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendments to Board Rule §365.8 are proposed under and affect Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by the proposed amendments.

§365.8. Change of Name, [~~or~~] Address, or Employment.

(a) Each licensee and registrant shall inform the Board in writing of any changes in legal name or mailing address not later than thirty days after a change in the person's legal name or mailing address. After receiving the notification of change of name or mailing address, together with the appropriate fee, the Board shall issue a new license or registration reflecting the change.

(b) Each Plumbing Inspector shall inform the Board in writing of each political subdivision that the Plumbing Inspector is employed by or has contracted with, for the purposes of performing plumbing inspections and any changes in contract or employment status within thirty days of status change. The written confirmation of contract or employment must be provided by an authorized representative of each political subdivision.

(c) Each licensee or registrant shall notify the Board in writing of any change to his or her primary place of employment upon renewal of his or her license or registration.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205960
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §365.13

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §365.13 (Board Rule §365.13) that pertains to the licensing of guaranteed student loan defaulters.

The amendment addresses cases in which a licensee or registrant is in default of child support payments. The amendment is based on a requirement from the Office of the Attorney General, as described in Texas Family Code, Chapter 232, that the Board shall not renew a professional license or registration if notified by the Office of the Attorney General of Texas that the licensee or registrant is delinquent in his or her child support payments. Further, the Board shall suspend a license or registration if ordered to do so by the Office of the Attorney General of Texas.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded the public will benefit from the rule change during the first five-year period because it enforces the law regarding an individual's obligation to pay child support. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendment to Board Rule §365.13 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§365.13. Licensing of Guaranteed Student Loan Defaulters and Child Support Defaulters.

(a) The Board shall refuse to renew the license or registration of a licensee or registrant whose name is on the list of those who have defaulted on student loans published by the Texas Guaranteed Students Loan Corporation (hereinafter TGSLC) unless:

(1) the renewal is the first renewal following the Board's receipt of a TGSLC list including the licensee's or registrant's name among those in default; or

(2) the licensee or registrant presents to the Board a certificate issued by the TGSLC certifying that:

(A) the licensee or registrant has entered into a repayment agreement on the defaulted loan; or

(B) the licensee or registrant is not in default on a loan guaranteed by the TGSLC [~~Corporation~~].

(b) The Board may issue an initial license or registration to an individual on TGSLC's list of defaulters who meets all other qualifications for licensing but shall not renew the license or registration unless the licensee presents to the Board a certificate issued by the TGSLC certifying that:

(1) the licensee or registrant has entered into a repayment agreement on the defaulted loan; or

(2) the licensee or registrant is not in default on a loan guaranteed by the TGSLC.

(c) The Board shall not renew the license or registration of a licensee or registrant who defaults on a repayment agreement unless the individual presents to the Board a certificate issued by the TGSLC certifying that:

(1) the licensee or registrant has entered into another repayment agreement on the defaulted loan; or

(2) the licensee or registrant is not in default on a loan guaranteed by the TGSLC or on a repayment agreement.

(d) The Board will provide the licensee or registrant identified by the TGSLC as being in default with written notice of his or her default status at least 30 days before the expiration date of the license or registration to the last known mailing address according to the Board's records.

(e) An individual informed by the Board of his or her default status according to the TGSLC shall be provided an opportunity for a hearing, if requested by the licensee or registrant, in accordance with these rules.

(f) In strict accordance with the provisions of Texas Family Code Chapter 232, pertaining to delinquent child support, if a licensee or registrant's name has been provided by the Office of the Attorney General of Texas as being in default of child support, the Board shall not renew the License or Registration on the renewal date following such notification. The Board shall not renew or reinstate said License or Registration unless the Office of the Attorney General certifies that the individual has satisfied the requirements of Chapter 232 of the Texas Family Code. The Board shall suspend a License or Registration upon order of the Attorney General of Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205961
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §365.14

The Texas State Board of Plumbing Examiners (Board) proposes amendments to 22 TAC §365.14 which pertains to Continuing Professional Education programs.

The amendment to §365.14(a)(7) eliminates the requirement that course providers include sample forms for doing business with licensees, registrants, and the public in their course materials. This amendment is intended to conserve the use of paper when materials are available online or by mail through the Board. The amendment to §365.14(c)(7) gives course providers the option of printing information required by §365.14(c)(4) - (6) in a course book rather than on a separate sheet of paper.

These revisions were identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendments are in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of the rule amendments.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the public will benefit because the amendments conserves paper by eliminating the superfluous requirement that forms be printed and presented at a continuing professional education program when such forms are available online or by mail. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendments to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendments to Board Rule §365.14 are proposed under and affect Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by the proposed amendments.

§365.14. Continuing Professional Education Programs.

(a) Course Materials--In preparation for the Continuing Professional Education course year, which begins on July 1, of each year, the Board will annually approve Course Materials to be used for the Continuing Professional Education (CPE) required for renewal of Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee and Plumbing Inspector Licenses. The CPE required for the renewal of the aforementioned licenses, shall be accepted by the Board as the mandatory training required under §1301.404 of the Plumbing License Law for the renewal of Drain Cleaner, Drain Cleaner-Restricted Registrant and Residential Utilities Installer registrations. The Course Materials are the printed materials that are the basis for a substantial portion of a CPE course and which are provided to the Licensees and Registrants for use in the classroom, correspondence courses and future reference by the Licensees and Registrants (students). The provider of Course Materials, Course Provider and Course Instructor shall encourage the student to retain the Course Materials for future reference and shall not purchase the used Course Materials from the student or otherwise offer any incentive to the student to not retain the Course Materials. Board approval of Course Materials will be subject to all of the terms and conditions of this Section. The following minimum criteria will be used by the Board in considering approval of Course Materials:

(1) The Course Materials will provide the basis for a minimum of six classroom hours of study. Three of the six hours will be in the subjects of health protection, energy conservation and water conservation, with the remaining three hours covering subjects which shall include information concerning the Act, Board Rules, current industry practices and codes, and subjects from lists of approved subjects published by the Board.

(2) The Board will periodically publish lists of approved subjects.

(3) The Course Materials must be presentations of relevant issues and changes within the subject areas as they apply to the plumbing practice in the current market or topics which increase or support the Licensee's development of skill and competence.

(4) The provider of the Course Materials must provide the Course Materials, as needed, in correspondence course form to comply with §1301.404(e) of the Act and subsection (b)(15)(L) of this section, which are to be made available for at least three (3) years or as necessary for renewal of an expired license.

(5) The Course Materials may not advertise or promote the sale of goods, products or services.

(6) The Course Materials must be printed and bound and, with the exception of the draft versions, must meet the following minimum technical specifications for printing and production:

(A) Binding--Perfect or Metal Coiled,

(B) Ink--Full Bleed Color,

(C) Cover Material--80 Pound Gloss Paper,

(D) Page Material--70 Pound.

(7) [~~The Course Materials will include Board forms used for doing business with licensees, registrants and the public. The Board forms shall be marked as being provided for example purposes only.~~] Course Materials will provide information stating that the most current Board forms used for doing business with licensees, registrants, and the public are available on the Board's website or by mail upon request.

(8) All Course Materials must have the following characteristics:

(A) Correct grammar, spelling and punctuation,

(B) Appropriate illustrations and graphics to show concepts not easily explained in words, and

(C) In depth and comprehensive presentation of subject matter which increases or supports the skills or competence of the Licensees and Registrants.

(9) The provider of Course materials must have legal ownership of or an appropriate license for the use of all copyrighted material included within the Course materials. Board approved Course materials will contain a prominently displayed approval statement in 10 point bold type or larger containing the following language: "THIS CONTINUING PROFESSIONAL EDUCATION COURSE MATERIAL HAS BEEN APPROVED BY THE TEXAS STATE BOARD OF PLUMBING EXAMINERS FOR USE IN THE (state year) CPE YEAR. BY ITS APPROVAL OF THIS COURSE MATERIAL, THE TEXAS STATE BOARD OF PLUMBING EXAMINERS DOES NOT ASSUME ANY RESPONSIBILITY FOR THE ACCURACY OF THE CONTENTS OF THE COURSE MATERIAL. FURTHER, THE TEXAS STATE BOARD OF PLUMBING EXAMINERS IS NOT MAKING ANY DETERMINATION THAT THE PARTY PUBLISHING THE COURSE MATERIALS HAS COMPLIED WITH ANY APPLICABLE COPYRIGHT AND OTHER LAWS IN PUBLISHING THE COURSE MATERIAL AND THE TEXAS STATE BOARD OF PLUMBING EXAMINERS DOES NOT ASSUME ANY LIABILITY OR RESPONSIBILITY THEREFOR. THE COURSE MATERIAL IS NOT BEING PUBLISHED BY NOR IS IT A PUBLICATION OF THE TEXAS STATE BOARD OF PLUMBING EXAMINERS."

(10) The provider of Course Materials will conduct instructor training in the use of Course Materials.

(11) The provider of Course Materials will be required to have distribution facilities that will ensure prompt distribution of course materials, facsimile ordering and a statewide toll free telephone number for placing orders. The provider of Course Materials must ship any ordered material within ten business days after the receipt of the order and payment for the course materials.

(12) The Board shall annually approve only individuals, businesses or associations to provide Course Materials. Any individual, business or association who wishes to offer to provide Course Materials shall apply to the Board for approval using application forms prepared by the Board. In order to be approved, the application must satisfy the Board as to the ability of the individual, business or association to provide quality Course Materials as required in this section and must include:

(A) name and address of individual applicant,

(B) names and addresses of all officers, directors, trustees or members of the governing board of any business or association applicant,

(C) statement by individual applicant, and each officer, director, trustee or member of governing board as to whether he or she has ever been convicted of a felony,

(D) current certificate of good standing issued to the business or association by the Texas Comptroller of Public Accounts for business or association applicants,

(E) fees to be charged for Course Materials,

(F) taxpayer identification number,

(G) name, telephone number and electronic mail address of the individual who is designated by the provider of Course Materials to be responsible for answering inquiries and receiving notifications from the Board.

(13) If the provider of Course Materials sells Course Materials to Course Providers, Registrants and Licensees, the Course Provider must sell the Course Materials at the same price as stated in the application.

(14) The Board may refuse to accept any application for approval as a provider of Course Materials that is not complete. The Board may deny approval of an application for any of the following reasons:

(A) failure to comply with the provisions of this section; or

(B) inadequate coverage of the materials required to be included in Course Materials.

(15) If an application is refused or disapproved, written notice detailing the basis of the decision shall be provided to the applicant.

(16) A provider's authority to offer the Course Materials for which CPE credit is given begins on July 1, of the calendar year of approval and continues until the Course Materials are no longer required for the renewal of an expired license or registration. When requested in writing, the Board may authorize the use of these Course Materials prior to July 1, for industry related programs.

(17) All providers of Course Materials must meet the following time schedule each year for approval of Course Materials:

(A) At least 15 copies each of the draft version of the Course Materials must accompany the Course Material Provider application and be submitted to the Board's office no later than November 15 for Board approval at its January Board meeting.

(B) At least 15 copies each of the revised version of the Course Materials must be submitted to the Board's office no later than March 15, for Board approval at its April Board meeting.

(C) At least 15 copies each of all Course Materials that are approved at the Board's April Board meeting shall be provided to the Board's office in completed form no later than July 1 at no cost to the Board.

(18) A provider's failure to comply with this section constitutes grounds for disciplinary action against the provider or for disapproval of future applications for approval as a provider of Course Materials.

(b) Course Providers--The Board will annually approve only individuals, businesses or associations as Course Providers. Course Providers will offer classroom and correspondence instruction in the Course Materials used for the Continuing Professional Education (CPE) required for renewal of all licenses and applicable registrations issued under the Act. Board approval of Course Providers will be subject to all of the terms and conditions of this Section. The following minimum criteria will be used by the Board in considering approval of Course Providers:

(1) CPE courses shall be presented in one of the following formats:

(A) Six classroom hours presented on one day;

(B) Two sessions of three classroom hours each presented within a seven day period; or

(C) An approved correspondence course.

(2) Not less than three hours of the classroom course will be in the subjects of health protection, energy conservation and water conservation.

(3) Presentations must be based on the Course Materials and any other materials approved by the Board.

(4) In addition to Course Materials, presentations may include videos, films, slides or other appropriate types of illustrations and graphic materials related to the Course Materials.

(5) Course Providers shall limit the number of students for any CPE class to forty-five (45). Course Providers may allow a Course Instructor to admit additional students in excess of forty-five (45) who apply to the Course Instructor for admittance to the class on the day of the class, only if the additional students:

(A) are currently on active duty as members of the United States armed forces, a reserve component of the United States armed forces or the state military forces; and

(B) present valid identification to the Course Instructor which indicates the additional students' status under subparagraph (A) of this paragraph.

(6) A Course Provider may not advertise or promote the sale of any goods, products or services between the opening and closing hours of any CPE class.

(7) Each Course Provider shall furnish a Certificate of Completion of CPE to each Licensee and Registrant who completes its CPE course. The Certificate of Completion shall state the name of the Course Provider, the name of the student, the course year and the date the CPE course was completed.

(8) Each Course Provider shall, at its own expense and in a format approved by the Board, electronically transmit to the Board certification of each Licensee's and Registrant's completion of CPE requirements within forty-eight hours of completion.

(A) The Board may provide training to the Course Provider in the method for electronic transmittal.

(B) The Board may charge a fee to recover its costs for computer software and training in the use of the software to the Course Provider.

(9) Each Course Provider shall be reviewed annually by the Board to ensure that classes have been provided equitably across the state of Texas, except as provided in paragraph (15)(J) of this subsection.

(10) Each Course Provider must notify the Board at least 7 days before conducting a class or electronically post notice of the class schedule on the Course Provider's website at least 7 days before conducting a class.

(A) The notice shall contain the time(s) and place(s) where the classes will occur, and the name of the Course Instructor scheduled for each class.

(B) The notice shall be provided to the Board, whether or not the class is open to all licensees and registrants or limited to only a specific group or organization.

(C) The Course Provider shall provide a method to receive immediate notification from the scheduled Course Instructor, in the event that the Course Instructor is unable to provide instruction for the scheduled class; and

(i) the Course Provider shall make every effort to provide a substitute Course Instructor in order to avoid cancelling the scheduled class.

(ii) If cancellation of the class is unavoidable for any reason, the Course Provider shall make every effort to immediately notify each student affected by the cancellation; and

(iii) reschedule the cancelled class as soon as possible; and

(iv) notify the Board of the cancellation within 72 hours.

(11) Each Course Provider will perform self-monitoring of its classes and Course Instructors to ensure compliance with the Act and Board rules and reporting as required by the Board.

(12) Each Course Provider shall use only Course Instructors that have been approved by the Board. Each Course Provider shall annually submit to the Board's office a list of Course Instructors it employs and the instructors' credentials for approval no later than March 15 for approval by the Board at its April Board meeting. The Board may approve additional Course Instructors who meet the requirements of subsection (c) of this section, at any regularly scheduled Board meeting.

(13) Prior to allowing Course Instructors to teach CPE, Course Providers must provide documentation to the Board showing the instructor's successful completion of Course Materials training.

(14) Course Instructors must comply with subsection (c) of this section. Course Providers shall notify the Board within 10 days of any change of an instructor's employment status with the Course Provider.

(15) Any individual, business or association who wishes to be a Course Provider shall apply to the Board for approval using application forms prepared by the Board. In order to be approved, the application must satisfy the Board as to the ability of the individual, business or association to provide quality instruction in the Course Materials as required in this section and must include:

(A) name and address of individual applicant,

(B) names and addresses of all officers, directors, trustees or members of the governing board of any business or association applicant,

(C) statement by individual applicant, and each officer, director, trustee or member of governing board as to whether he or she has ever been convicted of a felony,

(D) current certificate of good standing issued to the business or association by the Texas Comptroller of Public Accounts for business or association applicants,

(E) taxpayer identification number,

(F) facsimile number, statewide toll free telephone number, Internet web site and electronic mail address,

(G) fees to be charged to Licensees for attending the course, considering the following:

(i) If the Course Provider is not also a provider of Course Materials and will purchase Course Materials, the Course Provider may not charge the Licensees or Registrants more than its actual cost for the Course Materials supplied to the Licensees and Registrants by the Course Provider.

(ii) The fees charged to the Licensees and Registrants for attending the course will be determined by the Course Provider.

(H) an example of a Licensee's and Registrant's Certificate of Completion of CPE,

(I) CPE class scheduling plan,

(J) plan for providing courses equitably across the state. The following individuals or businesses will not have to comply with this subparagraph:

(i) Employers applying to be approved as Course Providers for the purpose of providing CPE courses only to the employers' employees, and

(ii) Individuals who will not employ Course Instructors other than themselves,

(K) method for compiling statistical data regarding number of CPE classes conducted, students instructed and similar data required to be submitted to the Board, in accordance with the following:

(i) Course Providers shall provide quarterly reports no later than December 15, March 15, June 15 and September 15, for the first year in which the Course Provider provides CPE courses;

(ii) Renewing Course Providers shall provide only annual reports, no later than September 15 of each year, for the preceding CPE course year.

(L) method for ensuring that only Licensees and Registrants who meet one or more of the following requirements may receive CPE credit for taking an CPE correspondence course:

(i) any Licensee or Registrant that lives outside of the State of Texas, or

(ii) lives in a county that does not have a city with a population in excess of 100,000, or

(iii) who has an expired license or registration that requires a CPE course that is no longer available in the classroom, or

(iv) who submits written proof to the Board from a physician stating the medical reason that the licensee or registrant is unable to attend a CPE class;

(M) identification of the Course Materials which will be used by the Course Provider; and

(N) the name, telephone number and electronic mail address of the individual who is designated by the Course Provider to be responsible for answering inquiries and receiving notifications from the Board.

(16) The Board may refuse to accept any application for approval as a Course Provider that is not complete. The Board may deny approval of an application for any of the following reasons:

(A) failure to comply with the provisions of this section; or

(B) inadequate instruction of the materials required to be included in Course Materials.

(17) If an application is refused or disapproved, written notice detailing the basis of the decision shall be provided to the applicant.

(18) A Course Provider's authority to offer instruction in the Course Materials for which CPE credit is given, begins on July 1, of the calendar year of approval and expires on June 30, of the following calendar year after approval.

(19) All Course Provider applications must be submitted to the Board office no later than December 1, each year for approval at the Board's January meeting.

(20) The Board shall review Course Providers for quality in instruction. The Board shall also investigate and take appropriate action, up to and including revocation of authority to provide CPE, regarding complaints involving approved Course Providers.

(21) A provider's failure to comply with this section constitutes grounds for disciplinary action, up to and including revocation of authority to provide CPE, against the provider or for denial of future applications for approval as a Course Provider.

(c) Course Instructors--The Board will annually approve Course Instructors to provide the classroom instruction in the Course Materials used for the Continuing Professional Education (CPE) required for renewal of Journeyman Plumber, Master Plumber, Tradesman Plumber-Limited Licensee and Plumbing Inspector Licenses and Drain Cleaner, Drain Cleaner-Restricted Registrant and Residential Utilities Installer registrations. Board approval of Course Instructors will be subject to all of the terms and conditions of this Section. Course Providers must submit the application of an individual who wishes to be approved by the Board as a Course Instructor, as provided by subsection (b)(12) and (13) of this section. The following minimum criteria will be used by the Board in considering approval of Course Instructors:

(1) Instructors must be licensees of the Board and attend and successfully complete a Course Instructor Certification Workshop each year conducted by the Board (the Board will charge a fee to recover its costs for conducting the Course Instructor Certification Workshop).

(2) Instructors will be required to successfully complete a Board approved program of 160 clock hours which meets the following criteria. The Board will allow credit for approved courses.

(A) 40 hours to provide the Instructor with the basic educational techniques and instructional strategies necessary to plan and conduct effective training programs.

(B) 40 hours to provide the Instructor with the basic techniques and strategies necessary to analyze, select, develop, and organize instructional material for effective training programs.

(C) 40 hours to provide the Instructor with the basic principles, techniques, theories, and strategies to establish and maintain effective relationships with students, co-workers, and other personnel in the classroom, industry, and community.

(D) 40 hours to provide the Instructor with the basic principles, techniques, theories, and strategies to communicate effectively with the use of instructional media.

(E) To maintain his/her status as an approved Course Instructor, the Instructor shall undergo one of the aforementioned training programs every 12 months such that the entire training (160 hours) is complete within four years.

(3) A Course Instructor may not advertise or promote the sale of goods, products, or services between the opening and closing hours of any CPE class.

(4) As a Course Instructor and Licensee of the Board, a Course Instructor must comply with the Plumbing License Law and Board Rules, including §367.2 of this title (relating to Standards of Conduct). An Instructor has a responsibility to his students and employer to:

(A) be well versed in and knowledgeable of the Course Materials and ensure that classroom presentations are based only on the Course Materials and other materials approved by the Board,

(B) maintain an orderly and professional classroom environment,

(C) ensure that only students who receive six contact hours of instruction (excluding any time spent on breaks from instruction) receive credit for attending the CPE class,

(D) notify the Course Provider immediately, if the Course Instructor is unable to provide instruction for a CPE class that the instructor was scheduled to instruct, to allow the Course Provider to make every effort to provide a substitute Course Instructor to avoid cancelling the class, and

(E) coordinate with the Course Provider to develop an appropriate method for handling disorderly and disruptive students. A Course Instructor shall report to the Course Provider and the Board, any non-responsive and disruptive student who attends a CPE course. The Board may deny CPE credit to any such student and require, at the student's expense, successful completion of an additional CPE course to receive credit.

(5) The Board shall review Course Instructors for quality of instruction. The Board shall also respond to complaints regarding Course Instructors.

(6) A Course Instructor's failure to comply with this section constitutes grounds for disciplinary action against the Instructor or for disapproval of future applications for approval as a Course Instructor.

(7) At the beginning of each CPE class, the Course Instructor shall provide each individual student with a separate single page handout containing the text of paragraphs (4) - (6) of this subsection[,] in a format provided by the Board or shall provide this information to each student printed on the inside of the front cover of the course book.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205962
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

CHAPTER 367. ENFORCEMENT

22 TAC §367.1

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §367.1 (Board Rule §367.1). The amendment adopts the latest edition of the International Plumbing Code.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of the rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will adopt the most up-to-date version of the International Plumbing Code. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by e-mail to info@tsbpe.state.tx.us.

The amendment to Board Rule §367.1 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by the proposed amendment.

§367.1. General Provisions.

(a) Enforcement of all applicable laws including the Act, Board rules, and Board orders vests in the Board.

(b) Enforcement of the Act, local codes, and ordinances, and local standards of competency vests in local authorities. The Board may take disciplinary actions as specified in this chapter in the event of any violation of any of these requirements.

(c) Each locally designated plumbing inspector shall enforce the Act and municipal ordinances and should file complaints with the Board and with local prosecutors.

(d) The Board shall employ individuals knowledgeable of plumbing practice and law as field representative to assist in the enforcement of the Act. A field representative may:

(1) Inspect plumbing work sites to assess compliance with the Law;

(2) Inquire into consumer complaints and reported violations of the Law;

(3) Assist municipal authorities in enforcing the Act; and

(4) Issue citations for violations of the Act.

(e) To protect the health and safety of the citizens of this state, the Board adopts the following plumbing codes:

(1) the 2012 [~~2006~~] Uniform Plumbing Code, as published by the International Association of Plumbing and Mechanical Officials; and

(2) the 2012 [~~2006~~] International Plumbing Code, as published by the International Code Council and the codes incorporated by reference within the 2012 [~~2006~~] International Plumbing Code, including:

(A) the 2012 [~~2006~~] International Fuel Gas Code; and

(B) the 2012 [~~2006~~] International Residential Code.

(f) The Board may by rule adopt later editions of the plumbing codes listed under subsection (e) of this section.

(g) Plumbing must be installed in accordance with the plumbing codes applicable to the area or jurisdiction where the plumbing is installed.

(1) Plumbing installed in an area where no plumbing code has been adopted and not otherwise subject to regulation under the Act or another state law by an individual licensed under the Act must be installed in accordance with a plumbing code adopted by the Board under subsection (e) or (f) of this section.

(2) Incomplete plumbing installations which commenced under the requirements of an earlier edition of the plumbing codes and prior to the Board's adoption of the 2012 [~~2006~~] editions of the plumbing codes, may continue to completion under the requirements of the earlier edition.

(3) Liquefied Petroleum Gas (LPG) piping must be installed in accordance with the rules of the Texas Railroad Commission.

(h) In adopting plumbing codes and standards for the proper design, installation, and maintenance of a plumbing system under this section, a municipality or an owner of a public water system may amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state.

(i) Plumbing installed in compliance with a code adopted under subsection (e), (f), or (h) of this section must be inspected by a plumbing inspector. To perform this inspection, the political subdivision may contract with any plumbing inspector or qualified plumbing inspection business, as determined by the political subdivision, that is paid directly by the political subdivision. The plumbing inspector must be licensed as required by §§1301.255(e), 1301.351(b) and 1301.551 of the Plumbing License Law.

(j) The potable water supply piping for every plumbing fixture, including water closet plumbing fixtures and other equipment that use water shall be installed to prevent the back flow of nonpotable substances into the potable water system according to the provisions of an adopted plumbing code. Water closet fill valves (ball cocks) shall be of the antisiphon, integral vacuum breaker type with the critical level (the air inlet portion of the vacuum breaker) installed at least one inch (1") above the flood level rim of the fixture (the inlet of the water closet overflow tube).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205963
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §367.4

The Texas State Board of Plumbing Examiners (Board) proposes amendments to 22 TAC §367.4 (Board Rule §367.4) that pertains to the display of a license and the company name.

The amendments require that Responsible Master Plumbers display their licenses in a conspicuous location to put the public on notice that they are licensed by the Board. The amendment also requires registrants to carry their Plumber's Apprentice Registration with them while engaged in plumbing work. Both requirements help the public and the Board's investigators to quickly identify individuals who are not licensed or registered by the Board to perform plumbing.

These revisions were identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendments are in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of the rule amendments.

Ms. Hill has concluded that the public will benefit from the rule changes during each year of the first five-year period because the rule amendments allow the public and Board's investigators to more readily identify individuals who are practicing plumbing while unlicensed or unregistered. Ms. Hill has determined that there will be no economic cost to individuals who would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendments to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendments to Board Rule §367.4 are proposed under and affect Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by the proposed amendments.

§367.4. Display of License and Company Name.

(a) Responsible Master Plumbers shall display the frameable certificate license in their place of business in a conspicuous location and all licensees and registrants [~~Licensees~~] shall carry the pocket card license with them while engaged in work.

(b) Each Responsible Master Plumber shall display permanently his or her Master Plumber License number and company name on both sides of all service vehicles used in conjunction with plumbing contracting by the Responsible Master Plumber.

(1) For the purposes of this rule a magnetic sign on a vehicle is not a permanent sign.

(2) The letters and numbers shall be not less than two (2) inches high and shall be in a color sufficiently different from the body of the vehicle so that the letters and numbers shall be plainly legible at a distance of not less than one hundred (100) feet.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205964
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

22 TAC §367.10

The Texas State Board of Plumbing Examiners (Board) proposes an amendment to 22 TAC §367.10 (Board Rule §367.10) which concerns administrative penalties issued by the Board.

The existing rule incorrectly cites a statute in Chapter 1301 of the Texas Occupations Code (Plumbing License Law). The amendment cites the proper statute in the Plumbing License Law.

This revision was identified during the agency quadrennial rule review.

Lisa G. Hill, Executive Director of the Texas State Board of Plumbing Examiners, has determined that for the first five-year period the rule amendment is in effect, there will be no fiscal impact on state and local governments as a result of amending this section.

Ms. Hill also has determined that for each year of the first five-year period the rule is amended, there will be no local employment impact as a result of this rule amendment.

Ms. Hill has concluded that for each year of the first five years the rule is amended, the anticipated public benefit will be that the Board's Rules will be more accurate. Ms. Hill has determined that there will be no economic cost to individuals who

would otherwise be subject to this rule. Ms. Hill has also determined there will be no measurable effect on small businesses and micro businesses. There is no anticipated difference in effect between small and large businesses.

Ms. Hill has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

The Texas State Board of Plumbing Examiners invites comments on the proposed amendment to this rule from any member of the public. Written comments should be mailed to Lisa Hill, Executive Director, at P.O. Box 4200, Austin, Texas 78765-4200; faxed to her attention at (512) 450-0637; or sent by email to info@tsbpe.state.tx.us.

The amendment to Board Rule §367.10 is proposed under and affects Chapter 1301 of the Texas Occupations Code (Plumbing License Law). Plumbing License Law §1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

No other statute, article, or code is affected by this proposed amendment.

§367.10. Administrative Penalty.

(a) If the Enforcement Committee decides to pursue an administrative penalty under the Administrative Penalty Schedule adopted by the Board, the Director of Enforcement shall issue a Notice of Alleged Violation to the Respondent which must include a brief summary of the alleged violation, state the amount of the penalty pursued and inform the Respondent of the Respondent's right to a hearing before the State Office of Administrative Hearings on the occurrence of the violation or the amount of the penalty.

(b) Not later than the 20th day after the Notice of Alleged Violation is received by the Respondent, the Respondent, in writing, shall:

(1) agree to settle the matter without a formal hearing before the State Office of Administrative Hearings and accept the determination and settlement penalty recommended by the Enforcement Committee; or

(2) make a request for a formal hearing before the State Office of Administrative Hearings on the occurrence of the violation, the amount of the penalty, or both.

(c) If the Respondent agrees to settle the matter without a formal hearing and accepts the determination and amount of penalty pursued by the Enforcement Committee, the Respondent shall pay the penalty to the Board not later than 60 days following the date that the Notice of Alleged Violation was issued.

(d) The Enforcement Committee shall provide a report to the Board stating a summary of the facts or allegations against the Respondent and the amount of the recommended administrative penalty agreed to by the Enforcement Committee and the Respondent. The Board, by order, shall approve the recommended penalty. If the Respondent subsequently violates the Board's Order adopting the agreement between the Respondent and the Enforcement Committee by failing to pay the penalty timely, the Board may:

(1) refuse to renew the Respondent's license or registration; and

(2) refuse to issue a new license or registration to the Respondent, under §1310.451 of the Plumbing License Law.

(e) The Enforcement Committee shall set a formal hearing on the matter as a contested case before an administrative law judge at the State Office of Administrative Hearings if:

(1) the Respondent requests a formal hearing not later than the 20th day after the Notice of Alleged Violation is received by the Respondent;

(2) the Respondent fails to respond in writing to the Notice of Alleged Violation not later than the 20th day after the Notice of Alleged Violation is received by the Respondent; or

(3) the Respondent fails to pay the agreed settlement penalty to the Board not later than 60 days following the date that the Notice of Alleged Violation was issued.

(f) Following the hearing the administrative law judge shall issue a proposal for decision to the Board containing findings of facts and conclusions of law.

(g) Based on the proposal for decision, including the findings of fact and conclusions of law, the Board shall issue an Order stating its decision in the contested case and a notice to the Respondent of the Respondent's right to judicial review of the Order.

(h) When the Board's Order includes the imposition of an administrative penalty:

(1) not later than the 30th day after the date that the Board's Order becomes final:

(A) the Respondent shall pay the penalty to the Board; or

(B) the Respondent shall file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both, in accordance with §1301.707 or §1301.708 of the Plumbing License Law.

(2) after all opportunities for judicial review have passed and it is determined that the Respondent owes the penalty and fails to pay the penalty timely:

(A) the Board is authorized to refuse to renew the Respondent's license or registration and refuse to issue a new license or registration to the Respondent, under §1301.707 of the Plumbing License Law; and

(B) the Attorney General may sue the Respondent to collect the penalty under §1301.712 [~~§1301.713~~] of the Plumbing License Law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205965
Lisa Hill
Executive Director
Texas State Board of Plumbing Examiners
Proposed date of adoption: January 14, 2013
For further information, please call: (512) 936-5224

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 200. REPORTING OF HEALTH CARE-ASSOCIATED INFECTIONS AND PREVENTABLE ADVERSE EVENTS

SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §§200.1 - 200.4, 200.6 - 200.8, 200.10

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§200.1 - 200.4, 200.6 - 200.8, and 200.10, concerning the reporting of a preventable adverse event (PAE).

BACKGROUND AND PURPOSE

The Texas Health and Safety Code, Chapter 98, requires any health care facility to report the incidence of PAEs as defined in that chapter. The amendments are necessary to define and add the reporting of designated PAEs.

The department is using the Centers for Disease Control and Prevention's National Healthcare Safety Network (NHSN) web reporting application for collecting data on designated PAEs in accordance with Health and Safety Code, Chapter 98, and this chapter. NHSN is capable of collecting specific, but limited PAEs.

The Centers for Medicare and Medicaid Services currently require that facilities report catheter associated urinary tract infection (CAUTI) as part of their Value Based Purchasing program under the Inpatient Prospective Payment System. Initially, the department will collect CAUTI data since it is currently reported by facilities to NHSN. As the department evaluates the resources needed to collect additional PAE data, it will promulgate additional rule amendments adding designated PAEs to report.

SECTION-BY-SECTION SUMMARY

The chapter title is amended to align with the title of the Health and Safety Code, Chapter 98 (Reporting of Health Care-Associated Infections and Preventable Adverse Events). Also, the term "health care-associated infection" replaced the term "healthcare-associated" in §§200.1, 200.2, 200.6, and 200.8, and the term "health care" replaced the term "healthcare" in §§200.1, 200.6, and 200.10 to be consistent with Health and Safety Code, Chapter 98.

Section 200.1 is amended to revise a definition of the Internal Classification of Disease (ICD) and to add definitions for PAE, urinary catheter, and urinary tract infection (UTI). The numbering of these paragraphs is amended due to these additions.

Section 200.2 is amended to add the PAEs to the name of the rule and to subsections (a), (c), and (d) for reporting guidelines by health care facilities.

Section 200.3(a), (b), (d), and (e)(2) is amended to add how to report the PAEs by health care facilities.

Section 200.4(c) is amended to add the requirement that health care facilities report on urinary catheter device days and UTIs. Subsequent subsections are amended to change the lettering due to these additions.

Section 200.6(b) and (f) is amended to add the reporting of PAEs. Rule references are corrected in subsections (b) - (d) to be consistent with the renumbering of §200.4 of this title. Subsection (e) was added to include the timeframe for reporting urinary catheter device days and UTIs.

Section 200.7(a) is amended to add PAEs to the name of the rule and reporting timeframes.

Section 200.8(a) and (b) is amended to add PAEs to the verification process and corrections to errors and disputes.

FISCAL NOTE

Lucina Suarez, Ph.D., Acting Assistant Commissioner, Division of Prevention and Preparedness Services, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Suarez has also determined that there will be no adverse effect on small businesses or micro-businesses that are required to comply with the sections as proposed because their business practices will not be altered.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Dr. Suarez has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The department will compile an annual summary, by health care facility, of the reporting infections. The summary will be made available on an Internet website. Showing infection rates by procedure and health care facility will benefit the public by providing information on infection risk at each health care facility. Efforts by health care facilities to reduce the infection rate for their facility will also benefit the public. The department and other Health and Human Service Commission agencies may use the reported data for research and analysis. In the case of the department, this will consist of earlier identification of outbreaks or infections associated with particular types of procedures, equipment or facilities.

REGULATORY ANALYSIS

The department has determined that the proposed rules are not a "major environmental rule" as defined by Government Code, §2001.0225. Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. The proposed rules are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Ron Gernsbacher, Program Coordinator, Emerging and Acute Infectious Disease Branch, Infectious Disease Control Unit, Prevention and Preparedness Services Division, Department of State Health Services, Mail Code 1960, P.O. Box 149347, Austin, Texas 78714-9347, (512) 776-7676 or email ron.gernsbacher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendments are proposed under Health and Safety Code, §98.101, which authorizes the Executive Commissioner to adopt rules to implement Chapter 98; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments affect the Health and Safety Code, Chapters 98 and 1001; and Government Code, Chapter 531.

§200.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (3) (No change.)

(4) Comments--Notes or explanations submitted by the health care [~~healthcare~~] facilities concerning the department's compilation and summary of the facilities' data that is made available to the public as described in the Texas Health and Safety Code, §98.106.

(5) Data--Facility and patient level information reported to the department for the purposes of monitoring health care-associated [~~healthcare-associated~~] infections.

(6) - (8) (No change.)

(9) Facility contact--Person identified by the health care [~~healthcare~~] facility responsible for coordinating communications related to data submission, verification and approval of data summary.

(10) - (12) (No change.)

(13) Health care-associated [~~Healthcare-associated~~] infection (HAI)--Localized or symptomatic condition resulting from an adverse reaction to an infectious agent or its toxins to which a patient is exposed in the course of the delivery of health care to the patient.

(14) Health care-associated [~~Healthcare-associated~~] infection data--Patient level information identifying the patient, procedures and events required by these rules, infections resulting from those procedures or events, and causative pathogens when laboratory confirmed.

(15) Health care [~~Healthcare~~] facility or facility--A general hospital or ambulatory surgery center.

(16) ICD-CM [~~ICD-9-CM~~]--The [~~ninth revision of the~~] International Classification of Diseases, Clinical Modification that is used to code and classify morbidity data from the inpatient and outpatient records of hospitals and[~~,~~] physician offices.

(17) - (19) (No change.)

(20) Preventable adverse event (PAE)--PAE as defined in Texas Health and Safety Code, §98.1045.

(21) [~~(20)~~] Reporting quarters--First quarter: January 1 through March 31; Second quarter: April 1 through June 30; Third quarter: July 1 through September 30; Fourth quarter: October 1 through December 31.

(22) [~~(21)~~] Risk adjustment--A statistical method to account for a patient's severity of illness and the likelihood of development of a health care-associated [~~healthcare-associated~~] infection (e.g., duration of procedure in minutes, wound class, and American Society of Anesthesiology (ASA) score).

(23) [~~(22)~~] Special care setting--A unit or service of a general, pediatric or adolescent hospital that provides treatment to inpatients who require extraordinary care on a concentrated and continuous basis. The term includes an adult intensive care unit, a burn intensive care unit and a critical care unit.

(24) Urinary catheter--As defined by the Centers for Disease Control and Prevention's National Healthcare Safety Network at www.cdc.gov/nhsn or its successor.

(25) Urinary tract infection (UTI)--As defined by the Centers for Disease Control and Prevention's National Healthcare Safety Network at www.cdc.gov/nhsn or its successor. A UTI associated with an indwelling urinary catheter is a catheter associated urinary tract infection (CAUTI).

(26) [~~(23)~~] Validation--The process of comparing data submissions to original patient and facility records to ascertain that data submission processes are accurate.

(27) [~~(24)~~] Verification--Review of data submitted electronically to assure completeness and internal consistency.

§200.2. General Reporting Guidelines for Health Care-Associated [~~Healthcare-Associated~~] Infection and Preventable Adverse Event Data.

(a) All general hospitals and ambulatory surgical centers in operation during any part of a reporting quarter described in §200.1 of this title (relating to Definitions) shall submit health care-associated [~~healthcare-associated infection~~] (HAI) and designated preventable adverse event (PAE) data as specified in §§200.3 - 200.7 of this title to the Centers for Disease Control and Prevention's National Healthcare Safety Network (NHSN) or its successor.

(b) (No change.)

(c) HAI or PAE data submission does not constitute the report of a disease as defined and required in Chapter 97 of this title (relating to Communicable Diseases).

(d) HAI or PAE data submission does not constitute annual events or incident reporting as defined in §133.49 of this title (relating to Reporting Requirements), or §135.26 of this title (relating to Reporting Requirements).

(e) (No change.)

§200.3. How to Report.

(a) Facilities shall submit HAI and designated PAE data required by this section to NHSN or its successor.

(b) Facilities shall comply with the process prescribed by NHSN or its successor to allow the department access to HAI and designated PAE data as specified in §§200.3 - 200.7 of this title.

(c) (No change.)

(d) The department shall notify the facility contact by email 90 calendar days in advance of any change in requirements for reporting HAI and designated PAE data.

(e) Facilities shall report HAI data on patients identified with a surgical site infection associated with a procedure listed in §200.4 of this title (relating to Which Events to Report).

(1) (No change.)

(2) If the facility treating the patient did not perform the surgery, the treating facility shall notify the facility that performed the procedure, document the notification, and maintain this documentation for audit purposes. The facility that performed the procedure shall verify the data related to the SSI and designated PAE and shall report the infection to NHSN or its successor according to the surveillance methods described by NHSN or its successor and this chapter.

§200.4. Which Events to Report.

(a) - (b) (No change.)

(c) All general hospitals, including pediatric and adolescents hospitals shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections in special care settings.

(d) [~~(c)~~] General hospitals, other than pediatric and adolescent hospitals, and ambulatory surgical centers shall report the HAI data related to the following surgical procedures. The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.

(1) Colon surgeries (Colon surgery).

(2) Hip arthroplasties (Hip prosthesis).

(3) Knee arthroplasties (Knee prosthesis).

(4) Abdominal hysterectomies (Abdominal hysterectomy).

(5) Vaginal hysterectomies (Vaginal hysterectomy).

(6) Coronary artery bypass grafts (Coronary artery bypass graft with both chest and donor site incisions and Coronary artery bypass graft with chest incision only).

(7) Vascular procedures (Abdominal aortic aneurysm repair, Carotid endarterectomy, and Peripheral vascular bypass surgery).

(e) [~~(d)~~] Pediatric and adolescent hospitals shall report the HAI data relating to the following surgical procedures. The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.

(1) Spinal surgery with instrumentation (Spinal fusion, Laminectomy, and Refusion of spine).

(2) Cardiac procedures, excluding thoracic cardiac procedures (Cardiac surgery and Heart transplant).

(3) Ventriculoperitoneal shunt procedures (Ventricular shunt operations), including revision and removal of shunt.

(f) [~~(e)~~] Facilities shall also report denominator data for the events identified in this rule for calculation of risk adjusted infection rates as required in Texas Health and Safety Code, §98.106(b). NHSN protocols shall be used for the determination of denominator data.

§200.6. When to Initiate Reporting.

(a) All health care [~~healthcare~~] facilities who meet the criteria in §200.4 of this title (relating to Which Events to Report) shall enroll in NHSN within 90 calendar days of the designation of NHSN as the secure electronic interface.

(b) Facilities shall submit HAI and designated PAE data beginning with the entire reporting quarter of the effective date in subsection (a) of this section.

(1) (No change.)

(2) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to knee arthroplasties as defined in §200.4(d)(3) [~~§200.4(c)(3)~~] of this title.

(3) Pediatric and adolescent hospitals--HAI data relating to ventriculoperitoneal shunts as defined in §200.4(e)(3) [~~§200.4(d)(3)~~] of this title.

(c) In addition to the data listed in subsection (b) of this section, facilities shall submit the following data beginning January 1, 2012.

(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to hip arthroplasties as defined in §200.4(d)(2) [~~§200.4(c)(2)~~] of this title and coronary artery bypass grafts as defined in §200.4(d)(6) [~~§200.4(c)(6)~~] of this title.

(2) Pediatric and adolescent hospitals--HAI data relating to cardiac procedures and as defined in §200.4(e)(2) [~~§200.4(d)(2)~~] of this title.

(d) In addition to the data listed in subsections (b) and (c) of this section, facilities shall submit the following data beginning January 1, 2013.

(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to abdominal and vaginal hysterectomies as defined in §200.4(d)(4) and (5) [~~§200.4(c)(4) and (5)~~] of this title, colon surgeries as defined in §200.4(d)(1) [~~§200.4(c)(1)~~] of this title, and vascular procedures as defined in §200.4(d)(7) [~~§200.4(c)(7)~~] of this title.

(2) Pediatric and adolescent hospitals--HAI data relating to spinal surgeries with instrumentation as defined in §200.4(e)(1) [~~§200.4(d)(1)~~] of this title.

(e) In addition to the data listed in subsections (b), (c), and (d) of this section, all facilities shall submit the following data beginning July 1, 2013. All general hospitals, including pediatric and adolescents hospitals, shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections as defined by NHSN, from special care settings.

(f) [~~(e)~~] Facilities that are required to report after this initial enrollment period (e.g., newly licensed, change in provider status, etc.) shall enroll within 90 calendar days of the date they become eligible to report in accordance with §200.2 of this title (relating to General Reporting Guidelines for Health Care-Associated [~~Healthcare-Associated~~] Infection and Preventable Adverse Event Data) and §200.3 of this title (relating to How to Report) and shall submit data beginning with the entire reporting quarter after becoming eligible.

§200.7. Schedule for HAI and PAE Reporting.

(a) Facilities shall submit HAI and designated PAE data according to the following schedule in Table 1.

Figure: 25 TAC §200.7(a)
[~~Figure: 25 TAC §200.7(a)~~]

(1) HAI and designated PAE data for device days and procedures occurring between January 1 and March 31 shall be submitted no later than May 31 of the same calendar year.

(2) HAI and designated PAE data for device days and procedures occurring between April 1 and June 30 shall be submitted no later than August 31, of the same calendar year.

(3) HAI and designated PAE data for device days and procedures occurring between July 1 and September 30 shall be submitted no later than November 30 of the same calendar year.

(4) HAI and designated PAE data for device days and procedures occurring between October 1 and December 31 shall be submitted no later than February 28 of the following calendar year.

(b) (No change.)

§200.8. Verification of Health Care-Associated [~~Healthcare-associated~~] Infection and Preventable Adverse Event Data and Correction of Errors.

(a) Data verification.

(1) (No change.)

(2) The department will notify the facility contact by email to acknowledge receipt of data and to communicate its acceptability within 15 calendar days after the facility data submission deadline described in §200.7 of this title (relating to Schedule for HAI and PAE Reporting). This notification will include specific information on any errors found.

(b) Correction of Errors and Disputes.

(1) (No change.)

(2) Corrections shall be submitted according to the following schedule.

(A) Not later than June 30 for HAI and designated PAE data for device days and procedures occurring between January 1 and March 31.

(B) Not later than September 30 for HAI and designated PAE data for device days and procedures occurring between April 1 through June 30.

(C) Not later than December 31 for HAI and designated PAE data for device days and procedures occurring between July 1 through September 30.

(D) Not later than March 31 for HAI and designated PAE data for device days and procedures occurring between October 1 through December 31.

(3) - (4) (No change.)

(c) (No change.)

§200.10. Data Validation.

All data submitted by facilities are subject to data validation. When requested by the department, a health care [~~healthcare~~] facility shall provide the department access to, copies of and/or information from the facility documents and records underlying and documenting the data submitted, as well as other patient related documentation deemed necessary to validate facility data.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205935
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 776-6972

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER C. ASSESSMENT OF MAINTENANCE TAXES AND FEES

28 TAC §1.414

The Texas Department of Insurance proposes amendments to 28 TAC §1.414, concerning the 2013 assessment of maintenance taxes and fees imposed by the Insurance Code. The proposed amendments are necessary to adjust the rates of assessment for maintenance taxes and fees for 2013 on the basis of gross premium receipts for calendar year 2012 and following the methodology described below.

Section 1.414 includes rates of assessment to be applied to life, accident, and health insurance; motor vehicle insurance; casualty insurance and fidelity, guaranty, and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; workers' compensation self-insured groups; title insurance; health maintenance organizations (HMOs); third party administrators; nonprofit legal services corporations issuing prepaid legal services contracts; and workers' compensation certified self-insurers.

The department proposes an amendment to the section heading to reflect the year for which the proposed assessment of maintenance taxes and fees is applicable. The department also proposes amendments in subsections (a), (b), (c), (d), (e), (f), and (h) to reflect the appropriate year for accurate application of the section.

The department proposes amendments in subsections (a)(1), (2), (3), (4), (6), (8), and (9); (c)(1), (2), and (3); (d); and (e) to update rates to reflect the methodology the department developed for 2013. This methodology is explained following the description of proposed amendments.

Finally, the department proposes amendments in subsections (d), (e), (f), and (h) that are grammatical in nature, for consistency with current department rule drafting style. In subsection (d), (e), and (f), every appearance of the word "shall" is changed to "must". In subsection (h), the word "shall" is changed to "will."

The following paragraphs provide an explanation of the methodology used to determine proposed rates of assessment for maintenance taxes and fees for 2013:

In general, the department's 2013 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; the department's self-directed budget

account, as established under the Insurance Code §401.252; and premium finance examination assessments) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2012.

To determine total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1355 (H.B. 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by the Insurance Code Chapter 401, Subchapters D and F, as approved by the commissioner for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2013 fiscal year until the next assessment collection period in 2014. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the remaining cost need to be attributed to each funding source using the following method:

For each section within the department that provides services directly to the public or the insurance industry, the department allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the self-directed budget account, the examination assessment, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated the percentage for each funding source by dividing the total directly allocated to each funding source by the total direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total direct costs and administrative support costs for each funding source.

The General Appropriations Act includes appropriations to state agencies other than the department that must be funded by Account No. 0036 and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees. The department adds these costs to the sum of the direct costs and the administrative support costs for the appropriate funding source when possible. For instance, the department allocates an appropriation to the Texas Department of Transportation for the crash information records system to the motor vehicle maintenance tax. The department includes costs for other agencies that cannot be directly allocated to a funding source to the administrative support costs. For instance, the department includes an appropriation to the Texas Facilities Commission for building support costs in administrative support costs.

The department calculates the total revenue need after completing the allocation of costs to each funding source. To complete the calculation of revenue need, the department removes costs, revenues, and fund balance related to the self-directed budget account. Based on remaining balances the department reduces the total cost need by subtracting the estimated ending fund balance for fiscal year 2012 (August 31, 2012) and estimated fee revenue collections for fiscal year 2013. The resulting balance is the estimated revenue need that must be supported during the 2013 fiscal year by the following funding sources: the maintenance taxes or fees, exam overhead assessments, and premium finance exam assessments.

The department determines the revenue need for each maintenance tax or fee line by dividing the total cost need for each maintenance tax line by the total of the revenue needs for all maintenance taxes. The department multiplies the calculated percentage for each line by the total revenue need for maintenance taxes. The resulting amount is the revenue need for each maintenance tax line. The department adjusts the revenue need by subtracting the estimated amount of fee and reimbursement revenue collected for each maintenance tax or fee line from the total of the revenue need for each maintenance tax or fee line. The department further adjusts the resulting revenue need as described below.

The cost allocated to the life, accident, and health maintenance tax exceeds the amount of revenue that can be collected at the maximum rate set by statute. The department allocates the difference between the amount estimated to be collected at the maximum rate and the costs allocated to the life, accident, and health maintenance tax to the other maintenance tax or fee lines. The department allocates the life, accident, and health shortfall based on each of the remaining maintenance tax or fee lines' proportionate share of the total costs for maintenance taxes or fees. The department uses the adjusted revenue need as the basis for calculating the maintenance tax rates.

For each line of insurance, the department divides the adjusted revenue need by the estimated premium volume or assessment base to determine the rate of assessment for each maintenance tax or fee.

The following paragraphs provide an explanation of the methodology to develop the proposed rates for the Division of Workers' Compensation (DWC) and the Office of Injured Employee Counsel (OIEC).

To determine the revenue need, the department considered the following factors applicable to costs for DWC and OIEC: (i) the appropriations in the General Appropriations Act for fiscal year 2012 from Account No. 0036; (ii) estimated other costs statutorily required to be paid from Account No. 0036, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance Account No. 0036 costs from the end of the 2013 fiscal year until the next assessment collection period in 2014. The department adds these three factors to determine the total revenue need.

The department reduces the total revenue need by subtracting the estimated fund balance at August 31, 2012, and the DWC fee and reimbursement revenue estimate to be collected and deposited to Account No. 0036 in fiscal year 2013. The resulting balance is the estimated revenue need from maintenance taxes. The department adjusted this balance by taking into consideration the balance of the Comptroller of Public Accounts tax allocation account for the Division of Workers' Compensation.

The department calculated the maintenance tax rate by dividing the estimated revenue need by the combined estimated workers' compensation premium volume and the certified self-insurers' liabilities plus the amount of expense incurred for administration of self insurance.

The following paragraphs provide an explanation of the methodology to develop the proposed rates for the workers' compensation research and evaluation group.

To determine the revenue need, the department considered the following factors that are applicable to the workers' compensation and research and evaluation group: (i) the appropriations in the General Appropriations Act for fiscal year 2013 from Account No. 0036 and from General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) estimated other costs statutorily required to be paid from these two funds, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance costs from these two funds from the end of the 2013 fiscal year until the next assessment collection period in 2014. The department adds these three factors to determine the total revenue need.

The department reduced the total revenue need by subtracting the estimated fund balance at August 31, 2012. The resulting balance is the estimated revenue need from maintenance taxes. The department adjusted the revenue need by taking into consideration the balance of the Comptroller of Public Accounts tax allocation account for the Division of Workers' Compensation. The department calculated the maintenance tax rate by dividing the estimated revenue need by the estimated assessment base.

FISCAL NOTE. Joe Meyer, assistant chief financial officer, has determined that for each year of the first five years the proposal will be in effect, the expected fiscal impact on state government is estimated income of $126,697,661 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the proposed section, and there will be no effect on local employment or local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Meyer also has determined that for each year of the first five years the amended section is in effect, the public benefit expected as a result of enforcing the section will be facilitation in the collection of maintenance tax and fee assessments.

The cost in 2013 to an insurer that receives premiums in 2012 will be: for motor vehicle insurance, .072 of 1 percent of those gross premiums; for casualty insurance, fidelity, guaranty, and surety bonds, .151 of 1 percent of those gross premiums; for fire insurance and allied lines, including inland marine, .305 of 1 percent of those gross premiums; for workers' compensation insurance, .108 of 1 percent of those gross premiums; and for title insurance, .151 of 1 percent of those gross premiums.

An insurer that receives premiums for workers' compensation insurance in 2012 will also pay 1.669 percent of that premium for the operation of the department's Division of Workers' Compensation Insurance and the Office of Injured Employee Counsel and .017 of 1 percent of that premium to fund the Workers' Compensation Research and Evaluation Group's activities. A workers' compensation self-insurance group will pay 1.669 percent of its 2012 gross premium for the group's retention under the Labor Code §407A.301 and .108 of 1 percent of its 2012 gross premium for the group's retention under the Labor Code §407A.302.

The cost in 2013 for an insurer that receives premiums in 2012 for life, health, and accident insurance, will be .040 of 1 percent of those gross premiums. In 2013, a health maintenance organization will pay $.41 per enrollee if it is a single service health maintenance organization or a limited service health maintenance organization, and $1.23 per enrollee if it is a multi-service health maintenance organization. In 2013, a third party administrator will pay .035 of 1 percent of its correctly reported gross amount of administrative or service fees received in 2012. In 2013, for a nonprofit legal services corporation issuing prepaid legal service contracts, the cost will be .029 of 1 percent of correctly reported gross revenues for 2012.

In 2013, to fund the Workers' Compensation Research and Evaluation Group's activities, a workers' compensation certified self-insurer will pay .017 of 1 percent of the tax base calculated pursuant to the Labor Code §407.103(b), and a workers' compensation self-insurance group will pay .017 of 1 percent of the tax base calculated pursuant to the Labor Code §407.103(b).

Finally, in 2013, a workers' compensation certified self-insurer will pay 1.669 percent of the tax base calculated pursuant to the Labor Code §407.103(b).

Except for workers' compensation certified self-insurers, there are two components of costs for entities required to comply with the proposal: the cost to gather the information, calculate the assessment, and complete the required forms; and the cost of the maintenance tax or fee. Based on the information obtained by the department, the actual cost of gathering the information required to fill out the form, calculate the assessment, and complete the form will be the same for the same number of lines for micro, small, and large businesses. Generally, a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. Such persons are similarly compensated between $23 - $34 an hour by small and large insurers. The actual time necessary to complete the form will vary depending on the number of lines of insurance written by the company. For a company that writes only one line of business subject to the tax, regardless of whether the company is micro, small, or large, the department estimates it will take two hours to complete the form. If a company writes all the lines subject to the tax, regardless of whether the company is micro, small, or large, the department estimates it will take six hours to complete the form. In the case of a certified insurer, the Division of Workers' Compensation will calculate the maintenance tax and bill the certified self-insurer. The requirement to pay the maintenance tax or fee is the result of the legislative enactment of the statutes that impose the maintenance tax or fee and is not a result of the adoption or enforcement of this proposal. Rates of assessment proposed by the department are the same for micro, small, or large businesses. The department, after considering the purpose of the authorizing statutes, does not believe it is legal or feasible to waive or modify the requirements of the proposal for small or micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the department has determined the proposal may have an adverse economic effect on approximately 56 to 188 insurance companies and HMOs and approximately 292 third party administrators that are small or micro businesses required to comply with the proposed rules. Adverse economic impact may result from the costs of the maintenance taxes and fees. The cost of compliance will not vary between large businesses and small or micro busi-

nesses, and the department's cost analysis and resulting estimated costs in the public benefit/cost note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses does not depend on the size of the business. For insurers in the following lines of insurance, the cost of compliance depends upon the amount of gross premiums in 2012: motor vehicle insurance; casualty insurance and fidelity, guaranty, and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; title insurance; and life, health, and accident insurance. For annuity and endowment contracts, the cost of compliance depends on the amount of gross considerations in 2012. For HMOs, the cost of compliance depends on the number of enrollees in 2012. For third party administrators, the cost of compliance depends on the amount of correctly reported gross administrative or service fees in 2012. For nonprofit legal service corporations issuing prepaid legal service contracts, the cost of compliance depends on the correctly reported gross revenues. For workers' compensation certified self-insurers and workers' compensation self-insurance groups, the cost of compliance depends on the tax base calculated pursuant to the Labor Code §407.103(b).

In accord with the Government Code §2006.002(c-1), the department considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to provide the rates of assessment for maintenance taxes and fees for 2013 to be applied to life, accident, and health insurance; motor vehicle insurance; casualty insurance and fidelity, guaranty and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; workers' compensation self-insured groups; title insurance; health maintenance organizations; third party administrators; nonprofit legal services corporations issuing prepaid legal services contracts; and workers' compensation certified self-insurers.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed rule, (ii) adopting different tax rates for small and micro businesses, and (iii) exempting small and micro businesses from the tax requirements.

Not adopting the proposed rule. Pursuant to the Insurance Code §251.003, if the commissioner does not advise the comptroller of the applicable maintenance tax assessment rates, the comptroller must assess taxes based on the previous year's assessment. Because the department has less revenue need for 2013 than it did for 2012, this would result in the department collecting an estimated $9.2 million more in funds than are needed. If no rule is adopted the department would burden companies with $9.2 million of unneeded taxes. For this reason, this option has been rejected.

Adopting different taxes for small and micro businesses. The current methodology is already the most equitable methodology the department can develop. The department applies an assessment methodology that contemplates a smaller assessment for small or micro businesses because the assessment is determined based on number of enrollees, gross premiums, or gross amount of administrative or service fees. The department anticipates that a small or micro business that would be most susceptible to economic harm would be one that has fewer enrollees, lower gross premiums, or a lower gross amount of administrative or service fees. However, based on the proposed rule, such a small or micro business would pay a smaller assessment, thereby reducing its risk of economic harm. For this reason, this option has been rejected.

Exemption of small and micro businesses from the tax requirements. As noted above, the current methodology is already the most equitable methodology the department can develop. The tax methodology currently used contemplates a small business paying lower maintenance taxes because assessments are based on number of enrollees, gross premiums, or gross amount of administrative or service fees. A small or micro business that has fewer enrollees, has lower gross premiums, or receives fewer gross administrative or service fees would be assessed lower taxes. However, if the assessment were completely eliminated for small or micro businesses, TDI would need to completely revise its calculations to shift costs to other insurers and entities, which would result in a less balanced methodology. For this reason, this option has been rejected.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want the department to consider written comments on the proposal, you must submit them no later than 5:00 p.m. on December 31, 2012, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Joe Meyer, Assistant Chief Financial Officer, Financial Services, Mail Code 108-3A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You should separately submit any request for a public hearing to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If the department holds a hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§201.001(a)(1), (b), and (c); 201.052(a), (d), and (e); 251.001; 252.001 - 252.003; 253.001 - 253.003; 254.001 - 254.003; 255.001 - 255.003; 257.001 - 257.003; 258.002 - 258.004; 259.002 - 259.004; 260.001 - 260.003; 271.002 - 271.006; and 36.001; and the Labor Code §§403.002, 403.003, 403.005, 405.003(a) - (c), 407.103, 407.104(b), 407A.301, and 407A.302.

The Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner must administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

The Insurance Code §201.052(a) requires the department to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(d) provides that in setting maintenance taxes for each fiscal year, the commissioner must ensure that the amount of taxes imposed is sufficient to fully reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(e) provides that if the amount of maintenance taxes collected is not sufficient to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller, other money in the Texas Department of Insurance operating account must be used to reimburse the appropriate portion of the general revenue fund.

The Insurance Code §251.001 directs the commissioner to annually determine the rate of assessment of each maintenance tax imposed under Insurance Code Title 3 Subtitle C.

The Insurance Code §252.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under the Insurance Code §252.003.

The Insurance Code §252.001 also specifies that the tax required by the Insurance Code Chapter 252 is in addition to other taxes imposed that are not in conflict with the Insurance Code Chapter 252.

The Insurance Code §252.002 provides that the rate of assessment set by the commissioner may not exceed 1.25 percent of the gross premiums subject to taxation under the Insurance Code §252.003. Section 252.002 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating all classes of insurance specified under: the Insurance Code Chapters 1807, 2001-2006, 2171, 6001, 6002, and 6003; Chapter 5, Subchapter C; Chapter 544, Subchapter H; Chapter 1806, Subchapter D; and §403.002; the Government Code §§417.007, 417.008, and 417.009; and the Occupations Code Chapter 2154.

The Insurance Code §252.003 specifies that an insurer must pay maintenance taxes under the Insurance Code Chapter 252 on the correctly reported gross premiums from writing insurance in Texas against loss or damage by: bombardment; civil war or commotion; cyclone; earthquake; excess or deficiency of moisture; explosion as defined by the Insurance Code §2002.006(b); fire; flood; frost and freeze; hail, including loss by hail on farm crops; insurrection; invasion; lightning; military or usurped power; an order of a civil authority made to prevent the spread of a conflagration, epidemic, or catastrophe; rain; riot; the rising of the waters of the ocean or its tributaries; smoke or smudge; strike or lockout; tornado; vandalism or malicious mischief; volcanic eruption; water or other fluid or substance resulting from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires, water pipes, or other conduits or containers; weather or climatic conditions; windstorm; an event covered under a home warranty insurance policy; or an event covered under an inland marine insurance policy.

The Insurance Code §253.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under the Insurance Code §253.003. Section 253.001 also provides that the tax required by the Insurance Code Chapter 253 is in addition to other taxes imposed that are not in conflict with the Insurance Code Chapter 253.

The Insurance Code §253.002 provides that the rate of assessment set by the commissioner may not exceed 0.4 percent of the gross premiums subject to taxation under the Insurance Code §253.003. Section 253.002 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating all classes of insurance specified under the Insurance Code §253.003.

The Insurance Code §253.003 specifies that an insurer must pay maintenance taxes under the Insurance Code Chapter 253 on the correctly reported gross premiums from writing a class of insurance specified under the Insurance Code Chapters 2008, 2251, and 2252; Chapter 5 Subchapter B; Chapter 1806 Subchapter C; Chapter 2301 Subchapter A; and Title 10 Subtitle B.

The Insurance Code §254.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under the Insurance Code §254.003. Section 254.001 also provides that the tax required by the Insurance Code Chapter 254 is in addition to other taxes imposed that are not in conflict with the Insurance Code Chapter 254.

The Insurance Code §254.002 provides that the rate of assessment set by the commissioner may not exceed 0.2 percent of the gross premiums subject to taxation under the Insurance Code §254.003. Section 254.002 also provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating motor vehicle insurance. Section 254.003 specifies that an insurer must pay maintenance taxes under the Insurance Code Chapter 254 on the correctly reported gross premiums from writing motor vehicle insurance in Texas, including personal and commercial automobile insurance.

The Insurance Code §255.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under the Insurance Code §255.003, including a stock insurance company, mutual insurance company, reciprocal or interinsurance exchange, and Lloyd's plan. Section 255.001 also provides that the tax required by the Insurance Code Chapter 255 is in addition to other taxes imposed that are not in conflict with the Insurance Code Chapter 255.

The Insurance Code §255.002 provides that the rate of assessment set by the commissioner may not exceed 0.6 percent of the gross premiums subject to taxation under the Insurance Code §255.003. Section 255.002 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating workers' compensation insurance.

The Insurance Code §255.003 specifies that an insurer must pay maintenance taxes under the Insurance Code Chapter 254 on the correctly reported gross premiums from writing workers' compensation insurance in Texas, including the modified annual premium of a policyholder that purchases an optional deductible plan under the Insurance Code Chapter 2053, Subchapter E. The section also provides that the rate of assessment shall be applied to the modified annual premium before application of a deductible premium credit.

The Insurance Code §257.001(a) imposes a maintenance tax on each authorized insurer, including a group hospital service corporation, managed care organization, local mutual aid association, statewide mutual assessment company, stipulated premium company, and stock or mutual insurance company, that collects from residents of this state gross premiums or gross considerations subject to taxation under the Insurance Code §257.003. Section 257.001(a) also provides that the tax required by Chapter 257 is in addition to other taxes imposed that are not in conflict with the Insurance Code Chapter 257.

The Insurance Code §257.002 provides that the rate of assessment set by the commissioner may not exceed 0.04 percent of the gross premiums subject to taxation under the Insurance Code §257.003. Section 257.002 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating life, health, and accident insurers. Section 257.003 specifies that an insurer must pay maintenance taxes under the Insurance Code Chapter 257 on the correctly reported gross premiums collected from writing life, health, and accident insurance in Texas, as well as gross considerations collected from writing annuity or endowment contracts in Texas. The section also provides that gross premiums on which an assessment is based under the Insurance Code Chapter 257 may not include premiums received from the United States for insurance contracted for by the United States in accord with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. Section 1395c et seq.) and its subsequent amendments; or premiums paid on group health, accident, and life policies in which the group covered by the policy consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county, or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

The Insurance Code §258.002 imposes a per capita maintenance tax on each authorized HMO with gross revenues subject to taxation under the Insurance Code 258.004. Section 258.002 also provides that the tax required by the Insurance Code Chapter 258 is in addition to other taxes that are not in conflict with the Insurance Code Chapter 258.

The Insurance Code §258.003 provides that the rate of assessment set by the commissioner on HMOs may not exceed $2 per enrollee. Section 258.003 also provides that the commissioner must annually adjust the rate of assessment of the per capita maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating HMOs. Section 258.003 also provides that rate of assessment may differ between basic health care plans, limited health care service plans, and single health care service plans and must equitably reflect any differences in regulatory resources attributable to each type of plan.

The Insurance Code §258.004 provides that an HMO must pay per capita maintenance taxes under the Insurance Code Chapter 258 on the correctly reported gross revenues collected from issuing health maintenance certificates or contracts in Texas. Section 258.004 also provides that the amount of maintenance tax assessed may not be computed based on enrollees who, as individual certificate holders or their dependents, are covered by a master group policy paid for by revenues received from the United States for insurance contracted for by the United States in accord with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. Section 1395c et seq.) and its subsequent amendments; revenues paid on group health, accident, and life certificates or contracts in which the group covered by the certificate or contract consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county, or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

The Insurance Code §259.002 imposes a maintenance tax on each authorized third party administrator with administrative or service fees subject to taxation under the Insurance Code §259.004. Section 259.002 also provides that the tax required by the Insurance Code chapter 259 is in addition to other taxes imposed that are not in conflict with the chapter. Section 259.003 provides that the rate of assessment set by the commissioner may not exceed one percent of the administrative or service fees subject to taxation under the Insurance Code §259.004. Section 259.003 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses of regulating third party administrators.

The Insurance Code §260.001 imposes a maintenance tax on each nonprofit legal services corporation subject to the Insurance Code Chapter 961 with gross revenues subject to taxation under the Insurance Code §260.003. Section 260.001 also provides that the tax required by the Insurance Code Chapter 260 is in addition to other taxes imposed that are not in conflict with the chapter. Section 260.002 provides that the rate of assessment set by the commissioner may not exceed one percent of the corporation's gross revenues subject to taxation under the Insurance Code §260.003. Section 260.002 also provides that the commissioner must annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating nonprofit legal services corporations. Section 260.003 provides that a nonprofit legal services corporation shall pay maintenance taxes under this chapter on the correctly reported gross revenues received from issuing prepaid legal services contracts in this state.

The Insurance Code §271.002 imposes a maintenance fee on all premiums subject to assessment under the Insurance Code §271.006. Section 271.002 also specifies that the maintenance fee is not a tax and shall be reported and paid separately from premium and retaliatory taxes. Section 271.003 specifies that the maintenance fee is included in the division of premiums and

may not be separately charged to a title insurance agent. Section 271.004 provides that the commissioner must annually determine the rate of assessment of the title insurance maintenance fee. Section 271.004 also provides that in determining the rate of assessment, the commissioner must consider the requirement to reimburse the appropriate portion of the general revenue fund under the Insurance Code §201.052. Section 271.005 provides that rate of assessment set by the commissioner may not exceed one percent of the gross premiums subject to assessment under the Insurance Code §271.006. Section 271.005 also provides that the commissioner must annually adjust the rate of assessment of the maintenance fee so that the fee imposed that year, together with any unexpended funds produced by the fee, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating title insurance. Section 271.006 requires an insurer to pay maintenance fees under the Insurance Code Chapter on the correctly reported gross premiums from writing title insurance in Texas.

The Labor Code §403.002 imposes an annual maintenance tax on each insurance carrier to pay the costs of administering the Texas Workers Compensation Act and to support the prosecution of workers' compensation insurance fraud in Texas. The Labor Code §403.002 also provides that the assessment may not exceed an amount equal to two percent of the correctly reported gross workers' compensation insurance premiums, including the modified annual premium of a policyholder that purchases an optional deductible plan under the Insurance Code Article 5.55C. The Labor Code §403.002 also provides that the rate of assessment be applied to the modified annual premium before application of a deductible premium credit. Additionally, the Labor Code §403.002 states that a workers' compensation insurance company is taxed at the rate established under the Labor Code §403.003, and that the tax must be collected in the manner provided for collection of other taxes on gross premiums from a workers' compensation insurance company as provided in the Insurance Code Chapter 255. Finally, the Labor Code §403.002 states that each certified self-insurer must pay a fee and maintenance taxes as provided by the Labor Code Chapter 407 Subchapter F.

The Labor Code §403.003 requires the commissioner of insurance to set and certify to the comptroller the rate of maintenance tax assessment, taking into account: (i) any expenditure projected as necessary for the division and the office of injured employee counsel to administer the Texas Workers' Compensation Act during the fiscal year for which the rate of assessment is set and reimburse the general revenue fund as provided by the Insurance Code §201.052; (ii) projected employee benefits paid from general revenues; (iii) a surplus or deficit produced by the tax in the preceding year; (iv) revenue recovered from other sources, including reappropriated receipts, grants, payments, fees, gifts, and penalties recovered under the Texas Workers' Compensation Act; and (v) expenditures projected as necessary to support the prosecution of workers' compensation insurance fraud. The Labor Code §403.003 also provides that in setting the rate of assessment, the commissioner of insurance may not consider revenue or expenditures related to the State Office of Risk Management, the workers' compensation research functions of the department under the Labor Code Chapter 405, or any other revenue or expenditure excluded from consideration by law.

The Labor Code §403.005 provides that the commissioner of insurance must annually adjust the rate of assessment of the maintenance tax imposed under §403.003 so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner of insurance determines is necessary to pay the expenses of administering the Texas Workers' Compensation Act. The Labor Code §405.003(a) - (c) establishes a maintenance tax on insurance carriers and self-insurance groups to fund the workers' compensation research and evaluation group, it provides for the department to set the rate of the maintenance tax based on the expenditures authorized and the receipts anticipated in legislative appropriations, and it provides that the tax is in addition to all other taxes imposed on insurance carriers for workers' compensation purposes.

The Labor Code §407.103 imposes a maintenance tax on each workers' compensation certified self-insurer for the administration of the Division of Workers' Compensation and the Office of Injured Employee Counsel and to support the prosecution of workers' compensation insurance fraud in Texas. The Labor Code §407.103 also provides that not more than two percent of the total tax base of all certified self-insurers, as computed under subsection (b) of the section, may be assessed for the maintenance tax established under Labor Code §407.103. The Labor Code §407.103 also provides that to determine the tax base of a certified self-insurer for purposes of the Labor Code Chapter 407, the department must multiply the amount of the certified self-insurer's liabilities for workers' compensation claims incurred in the previous year, including claims incurred but not reported, plus the amount of expense incurred by the certified self-insurer in the previous year for administration of self-insurance, including legal costs, by 1.02. The Labor Code §407.103 also provides that the tax liability of a certified self-insurer under the section is the tax base computed under subsection (b) of the section multiplied by the rate assessed workers' compensation insurance companies under the Labor Code §403.002 and §403.003.

Finally, the Labor Code §407.103 provides that in setting the rate of maintenance tax assessment for insurance companies, the commissioner of insurance may not consider revenue or expenditures related to the operation of the self-insurer program under the Labor Code Chapter 407.

Section 407.104(b) provides that the department must compute the fee and taxes of a certified self-insurer and notify the certified self-insurer of the amounts due. Section 407.104(b) also provides that a certified self-insurer must remit the taxes and fees to the Division of Workers' Compensation.

The Labor Code §407A.301 imposes a self-insurance group maintenance tax on each workers' compensation self-insurance group based on gross premium for the group's retention. The Labor Code §407A.301 provides that the self-insurance group maintenance tax is to pay for the administration of the Division of Workers' Compensation, the prosecution of workers' compensation insurance fraud in Texas, the research functions of the department under Labor Code Chapter 405, and the administration of the Office of Injured Employee Counsel under Labor Code Chapter 404. The Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(1) and (2) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under the Labor Code §403.002 and §403.003. The Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(3) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under the Labor Code §405.003. Additionally, the Labor Code §407A.301 provides that the tax under the section

does not apply to premium collected by the group for excess insurance. Finally, the Labor Code §407A.301 provides that the tax under the section must be collected by the comptroller as provided by the Insurance Code Chapter 255 and the Insurance Code §201.051.

The Labor Code §407A.302 requires each workers' compensation self-insurance group to pay the maintenance tax imposed under the Insurance Code Chapter 255, for the administrative costs incurred by the department in implementing the Labor Code Chapter 407A. The Labor Code §407A.302 provides that the tax liability of a workers' compensation self-insurance group under the section is based on gross premium for the group's retention and does not include premium collected by the group for excess insurance. The Labor Code §407A.302 also provides that the maintenance tax assessed under the section is subject to the Insurance Code Chapter 255, and that it must be collected by the comptroller in the manner provided by the Insurance Code Chapter 255.

The Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§201.001(a)(1), (b), and (c); 201.052(a), (d), and (e); 251.001, 252.001 - 252.003; 253.001 - 253.003; 254.001 - 254.003; 255.001 - 255.003; 257.001 - 257.003; 258.002 - 258.004; 259.002 - 259.004; 260.001 - 260.003; and 271.002 - 271.006; and Labor Code §§403.002, 403.003, 403.005, 405.003(a) - (c), 407.103, 407.104(b), 407A.301, and 407A.302.

§1.414. Assessment of Maintenance Taxes and Fees, 2013 [~~2012~~].

(a) The department assesses the following rates for maintenance taxes and fees on gross premiums of insurers for calendar year 2012 [~~2011~~] for the lines of insurance specified in paragraphs (1) - (9) of this subsection:

(1) for motor vehicle insurance, pursuant to the Insurance Code §254.002, the rate is .072 [~~.077~~] of 1.0 percent;

(2) for casualty insurance, and fidelity, guaranty, and surety bonds, pursuant to the Insurance Code §253.002, the rate is .151 [~~.152~~] of 1.0 percent;

(3) for fire insurance and allied lines, including inland marine, pursuant to the Insurance Code §252.002, the rate is .305 [~~.331~~] of 1.0 percent;

(4) for workers' compensation insurance, pursuant to the Insurance Code §255.002, the rate is .108 [~~.151~~] of 1.0 percent;

(5) for workers' compensation insurance, pursuant to the Labor Code §403.003, the rate is 1.669 percent;

(6) for workers' compensation insurance, pursuant to the Labor Code §405.003, the rate is .017 [~~.016~~] of 1.0 percent;

(7) for workers' compensation insurance, pursuant to the Labor Code §407A.301, the rate is 1.669 percent;

(8) for workers' compensation insurance, pursuant to the Labor Code §407A.302, the rate is .108 [~~.151~~] of 1.0 percent; and

(9) for title insurance, pursuant to the Insurance Code §271.004, the rate is .151 [~~.401~~] of 1.0 percent.

(b) The rate for the maintenance tax to be assessed on gross premiums for calendar year 2012 [~~2011~~] for life, health, and accident insurance and the gross considerations for annuity and endowment contracts, pursuant to the Insurance Code §257.002, is .040 of 1.0 percent.

(c) The department assesses rates for maintenance taxes for calendar year 2012 [~~2011~~] for the following entities as follows:

(1) pursuant to the Insurance Code §258.003, the rate is $.41 [~~$.50~~] per enrollee for single service health maintenance organizations, $1.23 [~~$1.50~~] per enrollee for multi-service health maintenance organizations, and $.41 [~~$.50~~] per enrollee for limited service health maintenance organizations;

(2) pursuant to the Insurance Code §259.003, the rate is .035 [~~.047~~] of 1.0 percent of the correctly reported gross amount of administrative or service fees for third party administrators; and

(3) pursuant to the Insurance Code §260.002, the rate is .029 [~~.030~~] of 1.0 percent of correctly reported gross revenues for nonprofit legal service corporations issuing prepaid legal service contracts.

(d) Pursuant to the Labor Code §405.003, each certified self-insurer must [~~shall~~] pay a maintenance tax for the workers' compensation research and evaluation group in calendar year 2013 [~~2012~~] at a rate of .017 [~~.016~~] of 1.0 percent of the tax base calculated pursuant to the Labor Code §407.103(b) which must [~~shall~~] be billed to the certified self-insurer by the Division of Workers' Compensation.

(e) Pursuant to the Labor Code §405.003 and §407A.301, each workers' compensation self-insurance group must [~~shall~~] pay a maintenance tax for the workers' compensation research and evaluation group in calendar year 2013 [~~2012~~] at a rate of .017 [~~.016~~] percent of 1.0 percent of the tax base calculated pursuant to the Labor Code §407.103(b).

(f) Pursuant to the Labor Code §407.103 and §407.104, each certified self-insurer must [~~shall~~] pay a self-insurer maintenance tax in calendar year 2013 [~~2012~~] at a rate of 1.669 percent of the tax base calculated pursuant to the Labor Code §407.103(b) which must [~~shall~~] be billed to the certified self-insurer by the Division of Workers' Compensation.

(g) The enactment of Senate Bill 14, 78th Legislature, Regular Session, relating to certain insurance rates, forms, and practices, did not affect the calculation of the maintenance tax rates or the assessment of the taxes.

(h) The taxes assessed under subsections (a), (b), (c), and (e) of this section will [~~shall~~] be payable and due to the Comptroller of Public Accounts, P.O. Box 149356, Austin, TX 78714-9356 on March 1, 2013 [~~2012~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205943
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 463-6326

♦ ♦ ♦

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER J. EXAMINATION EXPENSES AND ASSESSMENTS

28 TAC §7.1001

The Texas Department of Insurance proposes amendments to 28 TAC §7.1001, concerning assessments to cover the expenses of examining domestic and foreign insurance companies and self-insurance groups providing workers' compensation insurance. Pursuant to the Insurance Code §843.156, the term "insurance company" as used in this proposal includes a health maintenance organization (HMO) as defined in the Insurance Code §843.002.

The proposed amendments are necessary to establish the examination expenses to be levied against and collected from each domestic and foreign insurance company and each self-insurance group providing workers' compensation insurance examined during the 2013 calendar year. The proposed amendments are also necessary to establish the rates of assessment to be levied against and collected from each domestic insurance company examined during the 2013 calendar year, based on admitted assets and gross premium receipts for the 2012 calendar year, and from each foreign insurance company examined during the 2013 calendar year, based on a percentage of the gross salary paid to an examiner for each month or part of a month during which the examination is made.

The department proposes an amendment to the section heading to reflect the year for which the proposed assessment will be applicable. The department also proposes amendments in subsections (b)(1), (c)(1), (c)(2)(A), (c)(2)(B), and (d) to reflect the appropriate year for accurate application of the section.

The department proposes amendments in subsection (c)(2)(A) and (B) to update assessments to reflect the methodology the department has developed for 2013, which is addressed following the description of proposed amendments.

The department proposes new paragraph (3) in subsection (c) to provide the overhead assessment for a company that was a domestic insurance company for less than a full year during calendar year 2012. Current paragraphs (3), (4), and (5) of subsection (c) are redesignated to address the addition of new paragraph (3), and conforming changes are proposed in subsection (c)(2) and redesignated (4).

Finally, the department proposes amendments in subsections (b), (b)(1), (b)(2), (b)(3), (c), (c)(1), (c)(2)(A), (c)(2)(B), redesignated subsection (c)(6), (d), and (e) that are grammatical in nature, for consistency with current department rule drafting style. In subsections (b), (b)(1), (b)(2), (b)(3), (c), (c)(1), (d), and (e), the department changes the word "shall" to "must" in each place that it appears. In subsections (b)(1) and (d) the department changes passively-phrased language to active voice. In subsection (c)(2)(A) and (B) the department deletes the word "upon." And in redesignated subsection (c)(6) the department replaces the word "accordance" with the word "accord."

The following paragraphs provide an explanation of the methodology used to determine examination overhead assessments for 2013.

In general, the department's 2013 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; premium finance exam assessments; and funds in the self-directed budget account, as established pursuant to the Insurance Code §401.252) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2012.

To determine total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1355 (HB 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by the Insurance Code Subchapters D and F of Chapter 401 as approved by the commissioner of insurance for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2013 fiscal year until the next assessment collection period in 2014. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the revenue need to be attributed to each funding source using the following method:

Each section within the department that provides services directly to the public or the insurance industry allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the examination assessment, the self-directed budget account as limited by the Insurance Code §401.252, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated a percentage for each funding source by dividing the total directly allocated to each funding source by the total of the direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total of direct costs and administrative support costs for each funding source.

To complete the calculation of the revenue need the department combined the costs allocated to the examination overhead assessment source and the self-directed budget account source. The department then subtracted the fiscal year 2013 estimated amount of examination direct billing revenue from the amount of the combined costs of the examination overhead assessment source and the self-directed budget account source. The resulting balance is the amount of the examination revenue need for the purpose of calculating the examination overhead assessment rates.

To calculate the assessment rates, the department allocated 50 percent of the revenue need to admitted assets and 50 percent to gross premium receipts. The department divided the revenue need for gross premium receipts by the total estimated gross premium receipts for calendar year 2012 to determine the proposed rate of assessment for gross premium receipts. The department divided the revenue need for admitted assets by the total esti-

mated admitted assets for calendar year 2012 to determine the proposed rate of assessment for admitted assets.

FISCAL NOTE. Joe Meyer, assistant chief financial officer, has determined that for each year of the first five years the proposed amendments will be in effect, the expected fiscal impact on state government is estimated income of $10,469,052 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Meyer also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit expected as a result of enforcing the section will be adequate and reasonable assessment rates to defray the state's expenses of domestic and foreign insurer examinations and administration of the laws related to these examinations during the 2013 calendar year. Mr. Meyer has determined that the direct economic cost to entities required to comply with the proposed amendments will vary.

The examination expense will consist of the actual salary of the examiner directly attributable to the examination and the actual expenses of the examiner directly attributable to the examination, including transportation, lodging, meals, subsistence expenses, and parking fees. The actual salary of an examiner is to be determined by dividing the annual salary of the examiner by the total number of working days in a year, and a company or group is to be assessed the part of the annual salary attributable to each working day the examiner examines the company or group.

The amount of the assessment in 2013 for domestic companies will be .00237 of 1.0 percent of the company's admitted assets as of December 31, 2012, excluding pension assets specified in subsection (c)(2)(A), and .00839 of 1.0 percent of the company's gross premium receipts for 2012, excluding pension related premiums specified in subsection (c)(2)(B) and premiums related to welfare benefits described in redesignated subsection (c)(6). The amount of the assessment in 2013 for foreign companies examined in 2013 will be 34 percent of the gross salary paid to each examiner for each month or partial month of the examination to cover the examiner's longevity pay; state contributions to retirement, social security, and the state paid portion of insurance premiums; and vacation and sick leave accruals.

There are two components of costs for entities required to comply with the assessment requirements in the proposal: the cost to gather the information, calculate the assessment, and complete the required forms; and the cost of the assessment. Based on information obtained by the department, the actual cost of gathering the information required to fill out the form, calculate the assessment, and complete the form will be the same for micro, small, and large businesses. Generally, a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. Such persons are similarly compensated by small and large insurers. The compensation is generally between $23 and $34 an hour. The department estimates that, regardless of whether the company is micro, small, or large, the required form can be completed in two hours. The requirement to pay the assessment necessary to cover the expenses of company examination is the result of legislative enactment and is not a result of the adoption or enforcement of this proposal. There is no difference in proposed rates of assessment for micro, small, and large businesses, except that for those domestic companies with an overhead assessment of less than $25 as computed under §7.1001(c)(2)(A) and (B), a minimum overhead assessment of $25 will be assessed.

The department, after considering the purpose of the authorizing statutes, does not believe it is legal or feasible to waive or modify the requirements of the proposal for small and micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the department has determined that the proposal may have an adverse economic effect on approximately 12 to 41 domestic insurance companies that are small or micro businesses required to comply with the proposed rules. It is not possible to anticipate the number or size of foreign insurance companies that may be required to comply with the proposed rule, because of the limited number of examinations the department conducts on foreign insurance companies. The department has determined that none of the workers' compensation self-insurance groups that must comply with the proposed rule would qualify as a small or micro business.

Adverse economic impact may result from costs associated with examination fees and the amount of the required assessment resulting from this proposal. The cost of compliance will not vary between large businesses and small or micro businesses, and the department's cost analysis and resulting estimated costs in the public benefit/cost note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses is not dependent upon the size of the business, but rather is dependent on: for foreign insurers and for workers' compensation self-insurance groups, the length of time it takes to conduct an examination, the annual salary of the examiner, and expenses associated with the examination; and for domestic insurers, the length of time it takes to conduct an examination, expenses associated with the examination, and the admitted assets and gross premium receipts of the company.

In accord with the Government Code §2006.002(c-1), the department has considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to propose a rule addressing examination fees and assessments for domestic and foreign insurance companies and workers' compensation self-insurance groups.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed rule, (ii) adopting a different assessment requirement for small and micro businesses, and (iii) exempting small or micro businesses from the assessment requirements.

Not adopting the proposed rule. Without adopting the proposed rule the department would be unable to collect the necessary funds to cover the examination functions of the department. The purpose of conducting examinations is to monitor the activities and solvency of insurance companies. Failure of the department to perform its examination functions could result in public harm if a company does not comply with the Insurance Code or becomes insolvent and this is not detected because of the lack of regular examinations. Not adopting the rule would also result in the department being out of compliance with the Insurance Code §401.151(c), which directs the department to impose an annual

assessment on domestic insurers in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of Texas related to the examination of insurers. For these reasons, this option has been rejected.

Adopting a different assessment requirement for small and micro businesses. The proposed assessment is already based on the most equitable methodology the department can develop. The department applies an assessment methodology that results in a smaller assessment, down to a minimum assessment of $25, for domestic insurer small or micro businesses because the assessment is determined based on premium levels and admitted assets. The department anticipates that a domestic insurer that is a small or micro business that would be most susceptible to economic harm would be one that writes fewer premiums and has fewer admitted assets. However, based on the proposed assessment requirements of the rule, that small or micro business would pay a smaller assessment, reducing its risk of economic harm. For these reasons, this option has been rejected.

Exempting small or micro businesses from the assessment requirements. As previously noted, the current methodology used to develop the proposed rule is already the most equitable that the department can develop. The department applies a methodology that contemplates a domestic insurer that is a small or micro business paying less of an assessment if it writes fewer premiums or has less admitted assets. However, if the assessment were completely eliminated for small or micro businesses, the Texas Department of Insurance would need to completely revise its calculations to shift costs to other insurers and entities, which would result in a less balanced methodology. For these reasons, this option has been rejected.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want the department to consider written comments on the proposal, you must submit them no later than 5:00 p.m. on December 31, 2012, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Joe Meyer, Assistant Chief Financial Officer, Financial Services, Mail Code 108-3A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You should separately submit any request for a public hearing to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If the department holds a hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§201.001(a)(1), (b), and (c); 401.151; 401.152; 401.155, 401.156; 843.156(h); and 36.001; and the Labor Code §407A.252(b).

The Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner shall administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

The Insurance Code §401.151 provides that a domestic insurer examined by the department or under the department's authority must pay the expenses of the examination in an amount the commissioner certifies as just and reasonable.

The Insurance Code §401.151 also provides that the department must collect an assessment at the time of the examination to cover all expenses attributable directly to that examination, including the salaries and expenses of department employees and expenses described by the Insurance Code §803.007. Section 401.151 also requires that the department impose an annual assessment on domestic insurers in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of Texas relating to the examination of insurers. Additionally, Section 401.151 states that in determining the amount of assessment, the department will consider the insurer's annual premium receipts or admitted assets, or both, that are not attributable to 90 percent of pension plan contracts as defined by Section 818(a), Internal Revenue Code of 1986; or the total amount of the insurer's insurance in force.

The Insurance Code §401.152 provides that an insurer not organized under the laws of Texas must reimburse the department for the salary and expenses of each examiner participating in an examination of the insurer and for other department expenses that are properly allocable to the department's participation in the examination. Section 401.152 also requires an insurer to pay the expenses under the section directly to the department on presentation of an itemized written statement from the commissioner. Additionally, §401.152 provides that the commissioner must determine the salary of an examiner participating in an examination of an insurer's books or records located in another state based on the salary rate recommended by the National Association of Insurance Commissioners or the examiner's regular salary rate.

The Insurance Code §401.155 requires the department to impose additional assessments against insurers on a pro rata basis as necessary to cover all expenses and disbursements required by law and to comply with the Insurance Code Chapter 401, Subchapter D, and §§401.103, 401.104, 401.105, and 401.106.

The Insurance Code §401.156 requires the department to deposit any assessments or fees collected under the Insurance Code Chapter 401, Subchapter D, relating to the examination of insurers and other regulated entities by the financial examinations division or actuarial division, as those terms are defined by the Insurance Code §401.251, to the credit of an account with the Texas Treasury Safekeeping Trust Company to be used exclusively to pay examination costs, as defined by the Insurance Code §401.251. Additionally, §401.156 provides that revenue not related to the examination of insurers or other regulated entities by the financial examinations division or actuarial division be deposited to the credit of the Texas Department of Insurance operating account.

The Insurance Code §843.156(h) provides that the Insurance Code Chapter 401, Subchapter D, applies to an HMO, except to the extent that the commissioner determines that the nature

of the examination of an HMO renders the applicability of those provisions clearly inappropriate.

The Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of Texas.

The Labor Code §407A.252(b) provides that the commissioner of insurance may recover the expenses of an examination of a workers' compensation self-insurance group under the Insurance Code Article 1.16, which was recodified as the Insurance Code §§401.151, 401.152, 401.155,401.156, and 401.156 by HB 2017, 79th Legislature Regular Session (2005), to the extent the maintenance tax under the Labor Code §407A.302 does not cover those expenses.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§201.001(a)(1),(b), and (c); 401.151; 401.152; 401.155; and 843.156(h); and Labor Code §407A.252(b).

§7.1001. Examination Assessments for Domestic and Foreign Insurance Companies and Self-Insurance Groups Providing Workers' Compensation Insurance, 2013 [2012].

(a) Pursuant to the Insurance Code §843.156 and for purposes of this section, the term "insurance company" includes a health maintenance organization as defined in the Insurance Code §843.002.

(b) An insurer not organized under the laws of Texas (foreign insurance company) must [shall] pay the costs of an examination as specified in this subsection.

(1) Pursuant to the Insurance Code §401.152, a foreign insurance company must [shall] reimburse the department for the salary and examination expenses of each examiner participating in an examination of the insurance company allocable to an examination of the company. To determine the allocable salary for each examiner, the department divides the [The] annual salary of each examiner [is to be divided] by the total number of working days in a year. The department assesses[, and] the company [is to be assessed] the part of the annual salary attributable to each working day the examiner examines the company during 2013 [2012]. The expenses the department assesses are [assessed shall be] those actually incurred by the examiner to the extent permitted by law.

(2) Pursuant to the Insurance Code §401.155, a foreign insurance company must [shall] pay an additional assessment of 34 percent of the gross salary the department pays to each examiner for each month or partial month of the examination to cover the examiner's longevity pay; state contributions to retirement, social security, and the state paid portion of insurance premiums; and vacation and sick leave accruals.

(3) A foreign insurance company must [shall] pay the reimbursements and payments required by this subsection to the department as specified in each itemized bill the department provides to the foreign insurance company.

(c) Pursuant to the Insurance Code §401.151, §401.155, and Chapter 803, a domestic insurance company must [shall] pay examination expenses and rates of overhead assessment in accordance with this subsection.

(1) A domestic insurance company must [shall] pay the actual salaries and expenses of the examiners allocable to an examination of the company. The annual salary of each examiner is to be divided by the total number of working days in a year, and the company is to be assessed the part of the annual salary attributable to each working day the examiner examines the company during 2013 [2012]. The expenses assessed shall be those actually incurred by the examiner to the extent permitted by law.

(2) Except as provided in paragraphs [paragraph] (3) and (4) of this subsection, the overhead assessment to cover administrative departmental expenses attributable to examination of companies is:

(A) .00237 [.00561] of 1.0 percent of the admitted assets of the company as of December 31, 2012 [2011], [upon] taking into consideration the annual admitted assets that are not attributable to 90 percent of pension plan contracts as defined in Section 818(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 818(a)); and

(B) .00839 [.02064] of 1.0 percent of the gross premium receipts of the company for the year 2012 [2011], [upon] taking into consideration the annual premium receipts that are not attributable to 90 percent of pension plan contracts as defined in Section 818(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 818(a)).

(3) Except as provided in paragraph (4) of this subsection, if a company was a domestic insurance company for less than a full year during calendar year 2012, the overhead assessment for the company is the overhead assessment required under paragraph (2)(A) and (B) of this subsection divided by 366 and multiplied by the number of days the company was a domestic insurance company during calendar year 2012.

(4) [(3)] If the overhead assessment required under paragraph (2)(A) and (B) of this subsection or paragraph (3) of this subsection produces an overhead assessment of less than a $25 total, a domestic insurance company shall pay a minimum overhead assessment of $25.

(5) [(4)] The department will base the overhead assessments on the assets and premium receipts reported in the annual statements.

(6) [(5)] For the purpose of applying paragraph (2)(B) of this subsection, the term "gross premium receipts" does not include insurance premiums for insurance contracted for by a state or federal government entity to provide welfare benefits to designated welfare recipients or contracted for in accord [accordance] with or in furtherance of the Human Resources Code, Title 2, or the federal Social Security Act (42 U.S.C. Section 301 et seq.).

(d) Pursuant to the Labor Code §407A.252, a workers' compensation self-insurance group must [shall] pay the actual salaries and expenses of the examiners allocable to an examination of the group. To determine the allocable salary for each examiner, the department divides the [The] annual salary of each examiner [is to be divided] by the total number of working days in a year. The department assesses[, and] the group [is to be assessed] the part of the annual salary attributable to each working day the examiner examines the company during 2013 [2012]. The expenses the department assesses are [assessed shall be] those actually incurred by the examiner to the extent permitted by law.

(e) A domestic insurance company must [shall] pay the overhead assessment required under subsection (c) of this section to the Texas Department of Insurance, P.O. Box 149104, MC 999, Austin, Texas 78714-9104 not later than 30 days from the invoice date.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205944
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 463-6326

♦ ♦ ♦

CHAPTER 25. INSURANCE PREMIUM FINANCE

SUBCHAPTER E. EXAMINATIONS AND ANNUAL REPORTS

28 TAC §25.88

The Texas Department of Insurance proposes amendments to §25.88, concerning an assessment which will be used to cover the general administrative expenses of the department's regulation of insurance premium finance companies. The proposed amendments are necessary to adjust the rate of assessment to ensure that there are sufficient funds to meet the expenses of performing the department's statutory responsibilities for examining, investigating, and regulating insurance premium finance companies. Under §25.88, the department levies a rate of assessment to cover the department's general administrative expenses for fiscal year 2013.

In the 2012 version of the rule, the department collected the assessment from each insurance premium finance company on the basis of a percentage of the company's total loan dollar volume for the 2011 calendar year, with a minimum assessment of $250. Application of the methodology for this proposed amendment to the rule indicates a need for only the minimum assessment of $250 from each insurance premium finance company for 2013.

The department proposes an amendment in the first sentence of the section to update the reference to the year in the section to 2013.

The department proposes an amendment in the third sentence of the section to update the rate of assessment to the level necessary for 2013. Additionally, the department proposes to delete paragraphs (1) and (2) of the section because the way the assessment is structured for 2013 does not necessitate subdivisions within the section.

Finally, the department proposes amendments in the first and second sentences of the section that are grammatical in nature, for consistency with current department rule drafting style. In the first sentence, the department changes the words "on or before" to "no later than." In the first and second sentences of the section, the department changes the word "shall" to "must" in each place that it appears.

The following paragraphs provide an explanation of the methodology the department used to determine its assessments for insurance premium finance companies for 2013.

In general, the department's 2013 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; the department's self-directed budget account, as established pursuant to the Insurance Code §401.252; and premium finance exam assessments) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2012.

To determine its total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1355 (HB 1), Acts of the 82nd Legislature, Regular Session, 2011 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by the Insurance Code Subchapters D and F of Chapter 401 as approved by the commissioner for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2013 fiscal year until the next assessment collection period in 2014. From these combined costs, the department subtracted costs attributable to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the revenue need to be attributed to each funding source using the following method:

For each section within the department that provides services directly to the public or the insurance industry, the department allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the examination assessment, the self-directed budget account as limited by the Insurance Code §401.252, or another funding source.

The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated a percentage for each funding source by dividing the total directly allocated to each funding source by the total of the direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total of direct costs and administrative support costs for each funding source.

In regard to premium finance company examinations, the department's examination division based its current allocation on the number of hours market conduct staff performs examinations on the premium finance companies. In previous years, the department's examination based its allocation methodology for premium finance company examinations on a pro rata share of the total number of examinations. This change in the cost allocations reduced the revenue need for premium finance company examinations significantly.

To complete the calculation of the revenue need, the department combined the costs allocated to the premium finance assessment source and the self-directed source attributable to regulation of premium finance insurance companies. The department subtracted the fiscal year 2013 estimated amount of premium finance fee revenue and the estimated combined 2012 ending funding balance of the premium finance assessment source and the self-directed budget account attributable to premium finance from the amount of the combined costs for regulation of premium finance insurance companies. The resulting balance was the amount of revenue need for the purpose of calculating the

premium finance assessment rate. The department divided the revenue need by the estimated loan dollar volume to determine the proposed rate of assessment for premium finance insurance companies. Based on this, the department determined that the estimated revenue need requires the collection of the minimum assessment amount of $250 from each insurance premium finance company.

FISCAL NOTE. Joe Meyer, assistant chief financial officer, has determined that for each year of the first five years the proposal will be in effect, the expected fiscal impact on state government is estimated income of $48,500 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the proposed section, and there will be no effect on local employment or local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Meyer also has determined that for each year of the first five years the proposed amended section is in effect, the public benefit expected as a result of enforcing the section will be sufficient funds to cover the department's expenses for regulating insurance premium finance companies.

There are two components of costs for entities required to comply with the proposal: the cost to gather information and complete the required forms, and the cost of the assessment.

The actual cost of gathering the information required to fill out the form and complete the form will be the same for micro, small, and large businesses. A person familiar with the accounting records of the company and accounting practices in general will probably perform the activities necessary to comply with the section. Such persons are similarly compensated by micro, small, and large insurance premium finance companies. The compensation is generally between $23 and $34 an hour. The department estimates that, regardless of whether the company is micro, small, or large, the required form can be completed in two hours.

The requirement to pay the assessment is the result of the legislative enactment of the statute that imposes the assessment and is not a result of the adoption or enforcement of this proposal.

There is no difference in proposed rates of assessment for micro, small, and large businesses. The cost of the assessment to a premium finance company in 2013, regardless of whether the company is micro, small, or large, will be $250, which has been the minimum assessment cost under §25.88 in previous years.

The department, after considering the purpose of the authorizing statute, does not believe it is legal or feasible to waive or modify the statutorily mandated requirements of the proposal for small and micro businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the department has determined that the proposal may have an adverse economic effect on approximately 107 to 128 licensed insurance premium finance companies that are small or micro businesses required to comply with the proposed rules. Adverse economic impact may result from costs associated with the amount of the required examination fee resulting from this proposal. The cost of compliance will not vary between large businesses and small or micro businesses, and the department's cost analysis and resulting estimated costs in the public benefit/cost note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses is not dependent on the size of the business, but rather is dependent on the total loan dollar volume of the insurance premium finance company.

In accord with the Government Code §2006.002(c-1), the department has considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to promulgate a rule addressing the rate of assessment to cover the department's statutory responsibilities for examining, investigating, and regulating insurance premium finance companies in 2013.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed rule, (ii) adopting different assessment for small and micro businesses, and (iii) exempting small and micro businesses from the assessment requirements.

Not adopting the proposed rule. Without adopting a rule the department will be unable to collect the necessary funds to cover costs of the examination function of the department. The purpose of conducting examinations is to monitor the activities and solvency of premium finance companies. Failure of the department to perform its examination functions could result in public harm if an insurance premium finance company ceased compliance with the Insurance Code or became insolvent and this was not detected because of the lack of regular examinations. Not adopting the rule would also result in premium finance companies being out of compliance with the Insurance Code §651.006, which requires a licensed insurance premium finance company to pay an amount that covers the direct and indirect costs of an examination or investigation and a proportionate share of the general administrative expense attributable to the regulation of licensed insurance premium finance companies. For these reasons, this option has been rejected.

Adopting a different assessment for small and micro businesses. The proposed assessment is already based on the most equitable methodology the department can develop. The department applies an assessment methodology that results in an assessment of $250. This amount is equal to the minimum assessment required by previous versions of the rule extending back to its initial adoption in 1995. The department anticipates that a small or micro business that would be most susceptible to economic harm would be one that has a lower loan dollar volume. However, based on the proposed rule, such a small or micro business would pay this minimum assessment, thereby reducing its risk of economic harm. For these reasons, this option has been rejected.

Exempting small and micro businesses from the assessment requirements. As previously noted, the current methodology used to develop the proposed amendments is already the most equitable that the department can develop. The department applies a methodology that contemplates companies, including those that are small or micro businesses, paying the minimum assessment that has been required under this section. However, if the assessment were completely eliminated for small or micro businesses, the department would need to completely revise its calculations to shift costs to other insurers and entities, which would result in a less balanced methodology. For these reasons, this option has been rejected.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by

this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want the department to consider written comments on the proposal, you must submit them no later than 5:00 p.m. on December 31, 2012, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Joe Meyer, Assistant Chief Financial Officer, Financial Services, Mail Code 108-3A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You should separately submit any request for a public hearing to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If the department holds a hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§201.001(a)(1), (b), and (c); 651.003; 651.005(b); 651.006(a); and 36.001.

The Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner must administer money in the Texas Department of Insurance operating account and may spend money from the account in accord with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

The Insurance Code §651.003 authorizes the commissioner to adopt and enforce rules necessary to administer the Insurance Code Chapter 651.

The Insurance Code §651.005(b) requires that the department deposit an assessment or fee associated with examination costs, as defined by §401.251, to the account described by §401.156(a).

The Insurance Code §651.006(a) requires each insurance premium finance company licensed by the department to pay an amount imposed by the department to cover the direct and indirect costs of examinations and investigations and a proportionate share of general administrative expenses attributable to regulation of insurance premium finance companies.

The Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§201.001(a)(1), (b), and (c); 651.003; 651.005(b); and 651.006(a).

§25.88. General Administrative Expense Assessment.

No later than [~~On or before~~] April 1, 2013 [~~2012~~], each insurance premium finance company holding a license issued by the department under the Insurance Code Chapter 651 must [~~shall~~] pay an assessment to cover the general administrative expenses attributable to the regulation of insurance premium finance companies. An insurance premium finance company must [~~shall~~] send payment to the Texas Department of Insurance, Financial, TPA/Premium Finance, Mail Code 999, 333 Guadalupe, P.O. Box 149104, Austin, Texas 78701-9104. The assessment to cover general administrative expenses is $250 [~~shall be computed and paid as follows~~].

[~~(1) The amount of the assessment is .01011 of 1.0 percent of the total loan dollar volume of the company for calendar year 2011].~~

[~~(2) If the amount of the assessment required by paragraph (1) of this section is less than $250, the amount of the assessment shall be $250.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205945
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 463-6326

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 11. CONTRACTS

SUBCHAPTER A. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

30 TAC §11.1

The Texas Commission on Environmental Quality (TCEQ, agency, commission) proposes an amendment to §11.1.

Background and Summary of the Factual Basis for the Proposed Rule

The Texas Comptroller of Public Accounts (Comptroller) conducted a disparity study in 2009 and as the result of the new study made revisions to 34 TAC Part 1, Chapter 20, Subchapter B (Historically Underutilized Business (HUB) rules). These revisions became effective on September 14, 2011. A state agency is required by Texas Government Code, §2161.003 to adopt the HUB rules. TCEQ's current rule adopting the HUB rules by reference refers to a previous version of the rule and does not reflect the current numbering of the rule.

Section Discussion

§11.1, Historically Underutilized Business Program

The proposal would amend §11.1 to update the reference to the Texas Comptroller of Public Accounts HUB rules. Should TCEQ not adopt this amended rule, TCEQ's rule will reference outdated HUB rules and incorrect rule numbers.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule is administrative in nature and updates agency rules concerning HUBs to adopt, by reference, revisions made by the Comptroller to 34 TAC. The agency is required by Texas Government Code, §2161.003 to adopt HUB rules. The proposed rule implements requirements that are already in effect, and there will be no fiscal implications for the agency or other units of state or local government as a result of adopting the revision to the HUB rules.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and administrative consistency with Comptroller HUB rules.

The proposed rule, which adopts HUB rules by reference, would not have a fiscal impact on individuals or businesses that provide goods and services to the agency since HUB requirements became effective statewide on September 14, 2011. The proposed rule is required by state law.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule adopts HUB provisions (as required by state law) that have already been implemented statewide.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect. The proposed rule adopts HUB requirements as required by state law.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule". The intent of the proposed rulemaking is to reflect the current numbering of the Comptroller's HUB rules. The changes are not expressly to protect the environment and reduce risks to human health and environment.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rule and performed an assessment of whether this proposed amendment constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of this amendment is to update and correct references to rules. Promulgation and enforcement of this proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, there are no burdens imposed on private real property.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, Texas Register Coordinator, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-036-011-AS. The comment period closes January 7, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Laura Cagle, Historically Underutilized Business Program Office, (512) 239-1293.

Statutory Authority

The amendment is proposed under the Texas Water Code, §5.013, Rules, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and any other laws of the state.

The proposed amendment implements the Texas Comptroller of Public Account's Historically Underutilized Business rules under 34 TAC Part 1, Chapter 20, Subchapter B, as required by Texas Government Code, §2161.003.

§11.1. Historically Underutilized Business Program.

(a) The commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC Part 1, Chapter 20, Subchapter B (relating to Historically Underutilized Business Program).[~~, Texas Procurement and Support Services in 34 TAC §§20.11 - 20.22 and §§20.26 - 20.28 (relating to Historically Underutilized Business Program), transferred effective September 1, 2007, as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4237).~~]

(b) The adoption of this rule is required by Texas Government Code, §2161.003, 76th Legislature, 1999.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205930
David Timberger
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 239-0779

♦ ♦ ♦

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER B. FAILURE TO ATTAIN FEE

30 TAC §§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, 101.116 - 101.122

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, and 101.116 - 101.122.

The proposed new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 (Section 185 requirements or Section 185, generally) require the SIP to include a requirement for the imposition of a Failure to Attain Fee (fee) for major stationary sources of volatile organic compounds (VOC) located in an ozone nonattainment area classified as severe or extreme if that area fails to attain the ozone National Ambient Air Quality Standard (NAAQS or standard) by the applicable attainment date. FCAA, §182(f) requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO_x). The Houston-Galveston-Brazoria (HGB) area (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties) was originally classified as severe for the one-hour ozone NAAQS of 0.12 parts per million and was required to attain this standard by November 15, 2007. The HGB area did not attain the one-hour ozone NAAQS by its attainment date, and, as of October 2012, is not demonstrating attainment at this time. EPA's finding that the HGB area did not attain the one-hour ozone standard by its attainment date was published in the *Federal Register* on June 19, 2012, and was effective on July 19, 2012. The fee is required to be paid until the area is redesignated as an attainment area for ozone. Additionally, the SIP must include procedures for the assessment and collection of the penalty fee.

As stated in FCAA, §182(d)(3) and (e) and §185, the required penalty is $5,000 per ton, as adjusted by the consumer price index (CPI), of VOC, NO_x, or both (depending upon how a stationary source is determined to be a major source) emitted in excess of 80% of a major stationary source's baseline amount. A stationary source that is major for VOC is subject to fees on VOC; a stationary source that is major for NO_x is subject to fees on NO_x; and a stationary source that is major for both VOC and NO_x will be subject to the fee on both VOC and NO_x. The source's baseline amount is proposed to be calculated as the lower of the baseline emissions or authorized emissions from the baseline year, which is 2007. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA impose and collect the fee.

Although EPA has revoked the one-hour ozone NAAQS, FCAA, §185 requirements still apply for one-hour ozone nonattainment areas that were classified severe or extreme. EPA's implementation rule for the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard originally provided that areas no longer were required to meet the requirements of FCAA, §185, but that rule was vacated by the D.C. Circuit court in, *South Coast v. EPA,* 472 F.3d 882 (D.C. Cir. 2007), *decision clarified on reh'g by* 489 F.3d 1245 (D.C. Cir. 2007), *cert. denied by* 128 S.Ct. 1065 (U.S. 2008). Future EPA rulemaking may specify how the EPA interprets the applicability of the penalty fee requirement for future ozone standards.

The commission previously proposed FCAA, §185 rules under §101, Subchapter B, in November 2009 (34 TexReg 8644). The proposed rules reflected the explicit FCAA, §185 fee-based calculation and considered alternative approaches to meet this obligation. The commission did not pursue adopting the rules because in January 2010 the EPA issued a guidance memo, titled *Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS,* (available at *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf)* indicating that states could meet the one-hour ozone standard FCAA, §185 obligation through a SIP revision containing either the fee program or an equivalent alternative program. The memo further stated that an area showing attainment of the more stringent 1997 eight-hour ozone standard, based on permanent and enforceable reductions, would no longer be required to submit a fee program SIP revision to satisfy anti-backsliding requirements associated with the transition from the one-hour ozone standard to the 1997 eight-hour ozone standard. The commission submitted a request for termination of the fee program in May 2010 based on data showing attainment of the 1997 eight-hour standard.

However, the EPA's January 2010 guidance memo was challenged by environmental groups, and on July 5, 2011, the United States Court of Appeals District of Columbia Circuit issued an opinion in *Natural Resources Defense Council v. EPA, No. 10-1056 (D.C. Cir.),* vacating the January 2010 guidance document. Previous to this ruling, on July 7, 2011, the EPA had taken final action on one termination determination request, from the State of Louisiana, for the Baton Rouge area. EPA had also proposed approval of a termination determination for the State of California, Sacramento Metro Area, but has not taken final action. On July 25, 2011, the EPA denied the commission's fee program termination request based on 2011 data that failed to show attainment of the 1997 eight-hour ozone standard and the July 5, 2011, appeals court decision. Additionally, preliminary 2011 data fail to show attainment of the one-hour standard in the HGB ozone nonattainment area. On August 30, 2011, EPA proposed redesignation of the Baton Rouge nonattainment area to attainment for the 1997 eight-hour ozone standard and further discussed its position regarding the application of the January 2010 guidance vacated by the D.C. Circuit. The EPA has stated that "{t}he Court's opinion does not preclude EPA from terminating the one-hour §185 anti-backsliding requirement for areas like Baton Rouge, that EPA has determined through notice and comment rulemaking, have attained the one-hour ozone stan-

dard due to permanent and enforceable emissions reductions. We believe that, for the purpose here of evaluating applicable requirements pertaining to redesignation, Louisiana's obligation to satisfy the one-hour ozone anti-backsliding requirement for §185 fees has been terminated." (See, *Proposed Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Louisiana; Baton Rouge Ozone Nonattainment Area: Redesignation to Attainment for the 1997 eight-hour Ozone Standard (See* 76 FedReg 53853, 53863 (August 30, 2011).)

Since the HGB area is currently not attaining the one-hour ozone standard, the commission is re-proposing rules to implement the requirements of the FCAA, §182(d)(3) and (e) and §185. Given the lack of additional EPA guidance or rules regarding applicability and implementation of the penalty fee requirement and recent actions by the EPA, the commission is proposing several flexibility options combined with a fee-based program for comment and consideration at adoption. The TCEQ proposes a program under FCAA, §172(e) with flexibility aspects not directly described in the FCAA, §185 rule, including but not limited to, alternative revenue, baseline aggregation, and timing of fees. The TCEQ requests comments on the proposed approach including appropriateness and impacts if they are not adopted.

The EPA originally described some basic principles concerning the applicability of the FCAA, §182(d)(3) and (e) and §185 fee obligation for severe or extreme ozone nonattainment areas. In a final rule published November 16, 2005, in the *Federal Register* (70 FedReg 69440) regarding the Maryland portion of the Washington, D.C. severe one-hour ozone nonattainment area, the EPA noted in response to a comment that "Section 185 of the Act simply requires that the SIP contain a provision that major stationary sources within a severe or extreme nonattainment area pay 'a fee to the state as a penalty' for failure of that area to attain the ozone NAAQS by the area's attainment date. This penalty fee is based on the tons of volatile organic compound or nitrogen oxide emitted above a source-specific trigger level during the 'attainment year.' It {the fee} first comes due for emissions during the calendar year beginning after the attainment date and must be paid annually until the area is redesignated to attainment of the ozone NAAQS. . . . Thus, if a severe area, with an attainment date of November 15, 2005, fails to attain by that date, the first penalty assessment will be assessed in calendar year 2006 for emissions that exceed 80% of the source's 2005 baseline emissions." *(See* 70 FedReg 69440, 69441.)

The EPA further states that a "penalty fee that is based on emissions could have some incidental effect on emissions if sources decrease their emissions to reduce the amount of the per ton monetary penalty. However, the penalty fee does not ensure that any actual emissions reduction will ever occur since every source can pay a penalty rather than achieve actual emissions reductions. The provision's plain language evinces an intent to penalize emissions in excess of a threshold by way of a fee; it does not have as a stated purpose the goal of emissions reductions." *(See* 70 FedReg 69440, 69441 - 69442.)

The EPA issued guidance *(Guidance on Establishing Baselines under Section 185 of the Clean Air Act (CAA) for Severe and Extreme Ozone Nonattainment Areas that Fail to Attain the 1-hour Ozone NAAQS by their Attainment)* on March 21, 2008 (available at *www.epa.gov/ttn/caaa/t1/memoranda/20080321_harnett_emissions_basline.pdf),* regarding establishing emission baseline amounts. The March 21, 2008, guidance memo discussed alternative methods for calculating the baseline amount, as permitted by FCAA, §185. The EPA noted that in some cases, baseline amounts may not be representative of normal operating conditions because a source's emissions may be irregular, cyclical, or otherwise significantly varied from year to year. The EPA indicated in its guidance that relying on its regulations for Prevention of Significant Deterioration (PSD) of Air Quality, which are found in 40 Code of Federal Regulations (CFR) §52.21(b)(48), would be an acceptable alternative method for calculating the baseline amount. Under the PSD rules, sources may use emissions data from any period of 24 consecutive months within the previous ten years (a two-in-ten look back period) to calculate an average annual actual emissions rate, referred to as baseline emissions in these proposed rules. The EPA determined the two-in-ten look back period to be reasonable because it allows sources to consider an average emissions rate for a full business cycle.

The PSD rules modify this concept for electrical utility steam generating units to 24 consecutive months within the previous five years (a two-in-five look back period) due to a shorter business cycle for those units. The commission agrees that use of the two-in-ten and two-in-five look-back periods are reasonable for sources for which emissions are irregular, cyclical, or otherwise vary significantly from year to year, and the commission proposes to provide this flexibility in the same manner as provided for in the Texas New Source Review Program.

In its 2010 guidance (available at: *http://www.epa.gov/glo/pdfs/20100105185guidance.pdf)* and in a rule published in the January 12, 2012, *Federal Register* (77 FedReg 1895) for South Coast Air Quality Management District (SCAQMD), the EPA proposed allowing the use of equivalent programs to fulfill the FCAA, §185 fee program. The EPA approved this rule in September 2012, but the rule has not yet been published in the *Federal Register.* Under the SCAQMD rule, the EPA proposed to approve programs funded to reduce VOC and NO_x that are qualified programs, surplus to the one-hour ozone SIP, and designed to result in direct reductions or facilitate future reductions of VOC or NO_x emissions as consistent with the principles of the anti-backsliding principle of the FCAA §172(e). The EPA required an equivalent alternative program to achieve the same emissions reductions, raise the same amount of revenue and establish a process by which penalty funds would be used to pay for emission reductions that would further improve ozone air quality, or a combination of emissions reductions or revenue collection.

The EPA, in its January 2010 memo, states that it may allow alternative programs for which "the proceeds are spent to pay for emissions reductions of ozone-forming pollutants (NO_x and/or VOC) in the same geographic area subject to the §185 program." The EPA further states, "Under this concept, states could develop programs that shift the fee burden from the specific set of major stationary sources that are otherwise required to pay fees according to §185, to other non-major sources of emissions, including owners/operators of mobile sources." From these statements, the TCEQ understands that the EPA supports equivalent alternative options to a fee-based program provided the option is "no-less stringent" than a strict fee-based program and generally meets the stated criteria. The EPA has also approved a San Joaquin Valley's (SJV) and proposed approval of SCAQMD's equivalent alternative programs pursuant to the 2010 guidance. The EPA's published approval on August 20, 2012, in the *Federal Register* (77 FedReg 50021) included an alternative fee revenue by assessing a fee on mobile sources. Revenue under SJV's FCAA, §185 fee program is used to offset any obligation due from major sources in the SJV nonattainment area.

On January 12, 2012, the EPA published proposed approval of SCAQMD Rule 317 as an equivalent alternative fee program *(See* 77 FedReg 1895). The SCAQMD Rule 317 establishes an equivalency account that is credited with expenditures from qualified programs that are in excess of that area's one-hour ozone SIP. No actual funding is transferred from the approved programs to the equivalency account; it is an accounting of the funds. The EPA considered this option equivalent to the principles of FCAA, §172(e). The EPA in its proposed approval of the SCAQMD program has indicated that it will accept alternative programs, whether through the incentives created by a penalty fee levied on pollution sources, through other funding of pollution control projects, or through a combination of both.

Consistent with SCAQMD's and SJV's approach, the TCEQ proposes rules to allow funding collected for qualified programs that intend to directly reduce VOC or NO_x emissions in the HGB area to offset the FCAA, §185 fee obligation. As with SCAQMD's and SJV's approach, no actual funding is transferred to the equivalent alternative program. The TCEQ proposes to focus on providing incentives for programs that collect revenue in the HGB area to maintain a focus on achieving further emission reductions to further support the equivalent alternative being proposed.

Revenue for the Texas Emissions Reduction Plan (TERP) program provides funds for programs that provide incentives to reduce NO_x and other pollutants, including VOC. The TCEQ is proposing to use TERP revenue that was collected after the one-hour ozone attainment date for the HGB one-hour ozone nonattainment area to offset the FCAA, §185 fee obligation for that area. In the HGB area, on-road motor vehicle NO_x emissions are the single-largest category of emissions at 42% of the NO_x emissions inventory in 2008. Revenue available for appropriation by the legislature and allocated to programs to reduce NO_x in this category is an effective method to reduce ozone in the area.

Funding for TERP is generated from sources in all areas of the state, including the HGB area. However, the TCEQ would identify and track TERP revenue generated from the HGB one-hour ozone nonattainment area in a Fee Equivalency Account that would be used to demonstrate equivalency of the proposed alternative to the imposition of a fee on major stationary sources only.

The programs funded through TERP revenue include clean school buses, heavy-duty diesel replacement programs, and other emission reduction technologies associated with mobile emissions that decrease ozone precursor emissions more directly than a penalty fee assessed on major stationary sources with this rulemaking. The TCEQ is proposing rules to credit the funding collected for these programs under TERP as an equivalent approach because TERP meets one of the three types of alternative programs that satisfies the FCAA, §185 fee requirement addressed in EPA's proposed final determinations regarding equivalent alternatives to FCAA, §185 fee programs and 2010 guidance memo. The programs funded through TERP revenue are similar to SCAQMD and SJV programs proposed for approval or given final approval by the EPA as meeting the requirements for equivalency for the FCAA, §185 fee program.

The objectives of TERP are specifically described in statute and are consistent with the objective described by the EPA for an equivalent program. TERP program objectives, listed in Texas Health and Safety Code (THSC), §386.052, address "achieving maximum reduction in oxides of nitrogen to demonstrate compliance with the state implementation plans" and "advancing new technologies that reduce oxides of nitrogen from facilities and other stationary sources." TERP, as described in THSC, §386.053, is restricted to having "safeguards that ensure that funded projects generate emissions reductions not otherwise required by state or federal law."

Another revenue source that has been identified with objectives associated with clean air activities are fees associated with the vehicle Inspection and Maintenance (I/M) program. Annually, approximately 3.3 million vehicles in the HGB area are subject to emissions inspections, and vehicles that meet the emissions standards established for the program are issued an inspection certificate. The Low-Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Repair Program (LIRAP) is one of the programs administered with these fees. LIRAP provides financial assistance for qualified owners of vehicles to make repairs or purchase replacement vehicles when their vehicle cannot pass emissions standards inspections. The LIRAP reduces the VOC and NO_x emissions from mobile sources by repairing or, through replacements, accelerating the turnover rate of older, more polluting vehicles. In this proposal, the TCEQ intends to credit the funding collected for I/M in the HGB area as an alternative to collecting a FCAA, §185 fee because the I/M program meets one of the three types of alternative programs that satisfies the FCAA, §185 fee requirement addressed in EPA's SCAQMD and SJV actions and 2010 guidance memo.

Under the proposed rules, the commission would be required to annually estimate the expected Failure to Attain Fee obligation and compare this estimation with the expected revenue from the proposed alternative program. The commission is proposing that funding associated with the programs after the attainment year would be accounted as revenue to meet the FCAA, §185 Failure to Attain Fee obligation. To obtain the estimated total FCAA, §185 fee obligation due from all major stationary sources, a baseline amount would be established for each of the major stationary sources (or group of sources, if aggregated per §101.107) in the HGB one-hour ozone nonattainment area. This baseline amount would be subtracted from each major stationary source's actual emissions and a Failure to Attain Fee would be applied. The resultant amount due from each major stationary source (or aggregated sources) would be summed to determine the HGB area FCAA, §185 obligation.

If revenue generated from TERP and I/M programs is insufficient to fully offset the HGB area FCAA, §185 obligation, then the remaining difference would be assessed as a fee on major stationary sources in the area on a prorated basis. The amount collected from each major stationary source would be discounted based on the amount of revenue credited in the Fee Equivalency Account. In this manner, these proposed rules would "backstop" any equivalent alternative funding with fees directly assessed on major stationary sources to meet each year's fee obligation. The FCAA, §185 fee obligation would be fully met either through the demonstration utilizing the Fee Equivalency Account or, if necessary, supplemented with directly assessed fees. This method of fee equivalency is no "less stringent" than a direct fee program required by FCAA, §185.

To determine a major stationary source's baseline amount and the Failure to Attain penalty fee that would apply to each major stationary source, the commission proposes to allow major stationary sources to aggregate emissions of VOC and NO_x in general, but also to aggregate those emissions across multiple major stationary sources under common control. In attachment C of the EPA's January 2010 memo, the EPA would ". . . allow

for aggregation of sources. We anticipate that we would be able to approve a FCAA, §185 fee program SIP that relies on a definition of 'major stationary source' that is consistent with the FCAA as interpreted in our existing regulations and policies." The EPA's 2010 memo further states that the EPA would allow aggregation of VOC with NO_x ". . . {p}rovided that the aggregation is not used to avoid a 'major source' applicability finding, and aggregation is consistent with the attainment demonstration . . . we believe states have a discretion to allow a major source to aggregate VOC and NO_x emissions." The TCEQ's proposed rules require a major stationary source to first determine its major source applicability for both VOC and for NO_x. In this approach, a major stationary source cannot use aggregation to avoid applicability of the FCAA, §185 Failure to Attain Fee rule.

In making determinations of whether common control exists, the commission will consider EPA guidance regarding common control. For example, in a final rule on the *Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Emissions Offset Interpretive Ruling* (45 FedReg 59878), the EPA stated it would determine control guided by the general definition of control used by the Securities and Exchange Commission (SEC). In SEC considerations of control, control "means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person whether through the ownership of voting shares, contract, or otherwise" (17 CFR §210.1 and §210.2(g)). The commission will also use other criteria to determine common control consistent with participation in local area banking programs, such as the Mass Emissions Cap and Trade or the Highly-Reactive Volatile Organic Compound Cap and Trade programs.

Emissions of VOC and NO_x do not impact ozone formation equally; therefore, the commission has employed a strategy of targeting those pollutants in a way that will allow ozone nonattainment areas to attain the standard as expeditiously as practicable. This targeting is a result of the knowledge gained from research and detailed modeling of each particular nonattainment area, and states are required by the FCAA to assess and develop strategies for nonattainment areas as part of the SIP revision process to achieve attainment and maintenance of the NAAQS. The emissions reduction strategy for the HGB ozone nonattainment area has included targeted measures to reduce NO_x emissions in preference to VOC emission reductions as an effective way to reduce ozone formation in the area. Owners or operators of major stationary sources may have also chosen to significantly reduce one pollutant at one major stationary source as part of a cost-effective control strategy to reduce ozone. The commission's proposed flexibility option to allow aggregation of VOC and NO_x as well as major stationary source aggregation for both pollutants continues to support this approach and is particularly relevant for the HGB ozone nonattainment area, as discussed in detail in previous rulemaking actions involving individual control strategies applicable in the HGB ozone nonattainment area, and in revisions to the HGB ozone nonattainment area SIP. This proposed aggregation method links the multi-pollutant control strategies in the EPA-approved SIP for the HGB ozone nonattainment area to an aggregated baseline amount and Failure to Attain Fee calculations that will be applicable in the HGB ozone nonattainment area to appropriately encourage further emission reductions in the area, while continuing to support the control strategies that were determined through photochemical modeling to be most effective for the area.

As addressed previously, FCAA, §185 requires the SIP to include a requirement for the imposition of a Failure to Attain Fee on major stationary sources of emissions of VOC in a severe or extreme ozone area that failed to attain the standard by its applicable due date. FCAA, §182(f) states that requirements "for major stationary sources of volatile organic compounds shall also apply to major stationary sources (as defined in §7602 of this title and subsections (c), (d), and (e) of this section) of oxides of nitrogen." Thus, the requirement to assess a fee on major stationary sources of NO_x emissions is also required. This language in FCAA, §182(f) does not explicitly state that requirements for NO_x sources are to be held separate from those for VOC but are "also required" for sources of NO_x emissions. In fact, VOC control strategies, because the nature of the control equipment used to reduce VOC emissions differs from those needed to reduce NO_x emissions and their location at a site, may be addressed separately. However, both VOC and NO_x control strategies have a common goal: to reduce ozone-forming emissions. The stated objective of FCAA, §182(f) and §185 is to assess a fee for VOC and NO_x emissions on major stationary sources emitting above a certain baseline amount of emissions. The per ton fee rate required for the pollutants remains the same regardless of whether the pollutant is VOC or NO_x and thus, there is no reason to require that a fee be assessed separately for each pollutant. The commission is proposing to allow a major stationary source to combine these emissions for baseline amount determinations and fee assessments providing that specified criteria are met to ensure consistency.

Additionally, the commission notes that EPA guidance allows for NO_x substitution in its Reasonable Further Progress (RFP) SIP revisions as further support for allowing VOC and NO_x to be aggregated for both baseline amount determinations and fee assessments. In its December 1993 NO_x Substitution Guidance (available at *http://www.epa.gov/ttncaaa1/t1/memoranda/noxsubst.pdf),* the EPA states the "condition for demonstrating equivalency is that the State-proposed emission control strategies must be consistent with emission reductions required to demonstrate attainment of the ozone NAAQS for the designated year of attainment."

To ensure equitable treatment among all major stationary sources, maintain consistency within the fee program, and facilitate transparency for the public, the proposed rules require that baseline amounts and aggregation methods, once established, would remain fixed except as consistent with §101.109 throughout the applicability of the Failure to Attain Fee obligation. Additionally, the proposed rules require that calculation of fee obligations remain consistent with the baseline amount determination approach. Once a particular method for baseline amount calculation is chosen, the penalty fee calculation must remain consistent with that method. Therefore, if a major stationary source elected to aggregate pollutants under one of the options of this subchapter as the most appropriate choice for determining a baseline, all subsequent Failure to Attain Fee obligations must remain consistent with that selection.

The EPA used the March 21, 2008, memorandum to evaluate the SJV FCAA, §185 fee rule, as noted in its proposed limited approval and limited disapproval published August 19, 2009, in the *Federal Register* (74 FedReg 41826). In reviewing the SJV FCAA, §185 fee rule, the EPA noted that there were several provisions that conflicted with FCAA, §185, which prevented full approval of the submitted SIP revision including: a provision that exempts units that begin operation after the attainment year; a provision that exempts a clean emissions unit as a unit that is

equipped with an emissions control technology that either has a minimum 95% control efficiency (or 85% for lean-burn internal combustion engines), or meets the requirements for achieved-in-practice Best Achievable Control Technology during the five years immediately prior to the end of the attainment year; a provision defining the baseline period as two consecutive years consisting of the attainment year and the year immediately prior to the attainment year; a provision allowing averaging over two to five years to establish baseline emissions; and a provision that defines "major source" by referring to a version of the definition that, although it correctly defines the major source threshold, is not SIP approved. The EPA noted, with regard to issue number two noted previously, that SJV did not request that the EPA review this option for acceptability as an equivalent alternative under FCAA, §172(e), and did not provide a demonstration that the program it submitted would ensure that controls are "not less stringent" than those required under FCAA, §172(e). The August 2009 notice provides some information regarding EPA's current position regarding the requirements of the FCAA, §185 fee program; however, the rule was not finalized. The EPA also noted in the SJV proposal that "{t}he State must adopt and submit a rule to collect fees . . . from those units, or consistent with the Administrator's obligation under FCAA, §185(d), EPA will collect those fees." *(See* 74 FedReg 41826 and 41828.) In its January 2010 memo, the EPA stated that it is acceptable to exempt or reduce the FCAA, §185 fee obligation on well controlled sources and to assign the required fees to poorly controlled sources as an incentive for further reductions. No excess fees would be collected under the commission's proposed rules; therefore, the commission does not propose to exempt well controlled units from the fee obligation. The commission is seeking comment on alternatives to provide assistance with clean unit obligations.

Lastly, during the stakeholder process conducted for the development of this proposed FCAA, §185 Failure to Attain Fee program in 2009, some commenters raised concerns regarding whether it is appropriate (and legal) for the commission to adopt a rule that requires companies to pay a fee for emissions that occurred prior to rule adoption. The commission proposes to collect Failure to Attain Fees on the most currently available emissions inventory at the time of rule adoption to ensure appropriate timely implementation of the FCAA, §185 fee obligation. The commission solicits comment on the appropriateness of this approach.

The commission recognizes that the fee is due for the HGB one-hour ozone nonattainment area because the area failed to demonstrate attainment of the one-hour ozone standard by the attainment date, and EPA has taken final action to make the determination of failure to attain. FCAA, §185 specifies that the fee is due until the area is redesignated as attainment; however, the one-hour ozone standard was revoked by the EPA, and the commission understands that the EPA will make no further designations relating to the one-hour ozone standard. Consequently, the commission proposes that the fee obligation end when the EPA redesignates the area to attainment (in the event that EPA changes its policy regarding redesignations for the one-hour ozone standard) or makes a finding of attainment. Additionally, the commission proposes to hold the collection of the fee in abeyance if three years of quality-assured data resulting in a design value that did not exceed the NAAQS are submitted to the EPA. This will facilitate a prompt end to the fee payment obligation while the EPA considers the quality-assured monitoring data.

Section by Section Discussion

§101.100, Definitions

Proposed new §101.100 contains definitions necessary for applying the rules. The terms defined include actual emissions, Area §185 obligation, attainment date, attainment year, baseline amount, baseline emissions, electric utility steam generating unit, extension year, equivalency credits, major stationary source, and Section 185 Account.

The *Area §185 Obligation* is proposed to be defined as the total amount of the *Failure to Attain Fee* that would be due for the HGB one-hour ozone nonattainment area based on summing the *Failure to Attain Fee* that is estimated to be due from each major stationary source. The EPA's 2010 guidance states that an equivalent program could be acceptable under FCAA, §172(e) if an alternative fee or program is equivalent to the fee that would be assessed on an area failing to meet the one-hour ozone standard. The Area §185 obligation is proposed to be the basis for making an equivalency demonstration for the commission's proposed alternative program.

Attainment date is proposed to be defined as the date an area was scheduled to have attained the ozone NAAQS under the FCAA. The *attainment year* is proposed as the full calendar year that contains the *attainment date. Extension year* would be proposed to be defined as a year that meets the requirements of FCAA, §181(a)(5).

Baseline emissions are proposed to be defined to include emissions from normal operations and emissions associated with startups, shutdowns, and maintenance but would exclude emissions from emissions events during a baseline period. Emissions events would be excluded from the baseline amount calculations because they are not authorized and are not representative of routine operations. The exclusion of emissions from emissions events in a baseline emissions calculation in the proposed rule is consistent with the PSD definition of baseline actual emissions in 30 TAC §116.112 of this title and 40 CFR §52.21(b)(48) that does not include non-compliant emissions in a baseline amount determination. For the purposes of this subchapter, baseline amount is the term referenced as "baseline amount" in the FCAA, §185 and would be the lower of baseline emissions or authorized emissions at a major stationary source as of the attainment year.

If the source's emissions are irregular, cyclical, or otherwise vary significantly from year to year, the average baseline emissions would be calculated from a consecutive 24-month historical period. *Electrical utility steam generating units* are specifically defined for this rule because the historical time period allowed in determining an average based on 24 months for those units differs from other types of emissions generating units. The definition of *electric utility steam generating unit* is consistent with the definition used in 30 TAC §116.12.

The *Failure to Attain Fee* is defined as the fee due from each major stationary source or Section 185 Account based on actual emissions of VOC, NO_x, or both exceeding the baseline amount.

The definition for *major stationary source* uses the definition in §116.12 for determining a major source of VOC or NO_x.

Because major stationary sources under common control may opt to aggregate for purposes of baseline amount determination and Failure to Attain Fee payment, a name for the group of one or major stationary sources is proposed to be defined as a *Section 185 Account.* A single identifying name will be used by the commission to track baseline amounts and Failure to Attain Fee

obligations. Because each aggregation may have its own Section 185 Account, a major stationary source may be in one Section 185 Account for VOC aggregation and in a second Section 185 Account for NO_x aggregation. Thus, a single major stationary source could belong to two separate Section 185 Accounts. Conversely, a Section 185 Account may only have one major stationary source.

§101.101, Applicability

The FCAA, §185 requires areas classified as severe or extreme for ozone to include a requirement for fees on VOC emissions in excess of 80% of a baseline amount for major sources located in an area failing to attain the standard by the attainment date applicable to that area. FCAA, §182(f) further requires that all SIP requirements applying to VOC also apply for sources of NO_x. This section proposes to identify the provisions of this subchapter that apply to the HGB one-hour ozone nonattainment area, which failed to demonstrate attainment of the one-hour ozone standard by its attainment date, November 15, 2007.

§101.102, Equivalent Alternative Fee

This section proposes that the executive director establish a Fee Equivalency Account. This account would be a listing of revenues available for appropriation by the legislature to programs with goals to reduce VOC or NO_x emissions in the HGB one-hour ozone nonattainment area. Specifically, the TCEQ proposes that the revenue collected for the TERP and the I/M programs be used to offset the HGB area FCAA, §185 Obligation. Only the revenue collected in the HGB one-hour ozone nonattainment area would be used in the Fee Equivalency Account. Both programs have been identified with stated goals to provide funding for programs that result in a reduction in VOC, NO_x, and other pollutant emissions into the atmosphere. The commission proposes to also restrict equivalent programs such as the proposed equivalent account to funding from the HGB one-hour ozone nonattainment area.

§101.104, Equivalent Alternative Fee Accounting

The Area §185 Obligation is based on actual emissions over a baseline amount and would be determined annually for the HGB one-hour ozone nonattainment area. An FCAA, §185 fee obligation (Failure to Attain Fee) is proposed to be calculated for each Section 185 Account. These resultant individual obligations would be summed to determine the overall Area §185 Obligation for the HGB one-hour ozone nonattainment area.

Funds, calculated on a dollar basis, associated with the Fee Equivalency Account would be credited from after the one-hour ozone standard attainment date. The funding associated with the Fee Equivalency Account for a given year would be compared with the one-hour ozone Area §185 obligation for a given year. Any surplus amount in the Fee Equivalency Account could be used to offset any future obligation without being discounted over time. If the Fee Equivalency Account is not sufficiently funded to fully meet the Area §185 obligation, a backstop provision would be invoked and major stationary sources would be assessed a prorated Failure to Attain Fee to generate sufficient revenue to meet the Area §185 obligation. The prorated Failure to Attain Fee would be calculated based on the amount in the Fee Equivalency Account and the overall Area §185 obligation. The amount that the Section 185 Account was obligated based on the calculations in §101.113 will be reduced to the prorated amount.

§101.106, Baseline Amount Calculation

The method for a one-time determination of the baseline amount for VOC, NO_x, or both (depending upon how a stationary source is determined to be a major source) is outlined in this proposed section. A baseline amount is required to be determined for each pollutant (VOC and NO_x) for which the source is major. If a stationary source that is major for both VOC and NO_x, a baseline amount estimate will be determined for both VOC and NO_x. If the major stationary source is major for only VOC or NO_x, the baseline amount estimate is required for just that pollutant (VOC or NO_x). However, for aggregation purposes, a source may choose to determine a baseline amount for a pollutant for which it is not major. The baseline amount is defined as the lower of either annual emissions, including maintenance, startup, and shutdown (MSS) emissions reported on the emissions inventory in the attainment year, or the emissions as allowed by the applicable Chapter 116 authorizations in effect for the major stationary source on the attainment date. Emissions from emissions events are not included in the baseline amount.

If the major stationary source has reported emissions that are irregular, cyclical, or otherwise vary significantly from year to year, an alternative method for determining emissions would be allowed using a historical perspective of annual and MSS emissions as outlined in §101.106(b).

The FCAA, §185 does not address how to define a historical period; however, the EPA issued a March 21, 2008, guidance memo, referenced elsewhere in this preamble, stating that an acceptable alternative method would be to determine a baseline amount using a period similar to estimating "baseline actual emissions" found in the EPA's PSD rules, 40 CFR §52.21(b)(48). In its March 21, 2008 guidance, the EPA uses these provisions to craft its guidance on a ten-year look-back period for calculating baseline actual emissions. The PSD rules require adequate data for the selected 24-month period. The data must adequately describe the operation and emission levels for each emissions unit. The guidance continues by stating, "{O}nce calculated, the average annual emission rate must be adjusted downward to reflect 1) any noncompliant emissions (40 CFR §52.21(b)(48)(i)(b) and (ii)(b)); and 2) for each non-utility emissions unit, the most current legally enforceable emissions limitations that restrict the source's ability to emit a particular pollutant or to operate at levels that existed during the 24-month period that was selected (40 CFR §52.21(b)(48)(ii)(c))." The result of this restriction is that the plant capacity utilized during a period of time may be referenced but not the non-compliant emissions levels if a historical 24-month period is selected. Legally enforceable emissions limits would include any state or federal requirements including Best Achievable Control Technology or Lowest Achievable Emissions Rate.

For the purposes of this proposed section, the target is the attainment year, 2007. The window used for the possible historical look-back period would be five years (2002 - 2006) for electric generating units (EGU) or 10 years (1997 - 2006) for non-EGU immediately preceding the attainment date of November 15 2007. The average consecutive 24-month period would be the basis for determining the baseline amount, in tons. All units at a major stationary source would be required to use the same 24-month period when calculating a baseline, but a separate 24-month period could be used for each pollutant. The commission interprets the FCAA, §185 language requiring the use of the lower of baseline emissions or authorized emissions to include emissions from an alternative method.

Emissions inventory data are collected annually by the commission, and after quality assurance review, are loaded into the

state's industrial emissions database. Owners or operators of major stationary sources are provided an opportunity to review and, if necessary, modify emissions inventory data submitted for the current reporting year and for the year immediately prior. Revisions to historical inventory data outside of this time frame are done on a case-by-case basis usually as a result of an agency-directed emissions inventory improvement initiative or the agency's compliance and enforcement processes. The commission uses the annual emissions inventory data as the emissions baseline for air quality planning as detailed in SIP revisions. Although emissions determination methods improve over time, emissions inventory data represent emissions for a reporting year as accurately as possible. Since the commission relies upon emissions inventory data in SIP revisions for air quality planning purposes, revising historical emissions inventory emissions rates is not supported solely for purposes of adjusting the baseline amount calculation.

Exclusion of emissions events from the baseline amount is consistent with the fact the emissions are not authorized or representative of normal operations. Exclusion of the emissions events in the 24-month average if an alternative baseline is used is consistent with EPA's and TCEQ's PSD rules that do not include non-compliant emissions.

If control or ownership changed for emission units during the attainment year, then emissions from those emission units would be attributed to the major stationary source with control or ownership of the emission unit on December 31st of the attainment year (2007).

The proposed rule would require the baseline amount calculation and supporting documentation to be submitted to the agency in a format approved by the executive director. The baseline amount calculation would be subject to approval by the executive director.

The FCAA, §185 fee is required on emissions exceeding 80% of a baseline amount determined for the attainment year until the Failure to Attain Fee no longer applies to the area. A baseline amount is determined by each major stationary source that is a major source of VOC, NO_x, or both based (depending on how the source is determined to be major) on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director except as consistent with §101.109.

§101.107, Aggregated Baseline Amount

This proposed section would provide for the aggregation of either VOC or NO_x (or both) at multiple major stationary sources to align fee obligations with the EPA-approved attainment demonstration emissions reduction approach. The proposed rule would allow owners or operators of major stationary sources under common control to aggregate baseline amounts of VOC emissions from multiple major stationary sources, to aggregate NO_x emissions from multiple major stationary sources, or both. Owners or operators may also choose to aggregate VOC with NO_x at a single major stationary source or VOC with NO_x across multiple major stationary sources under common control.

Baseline amounts would first be calculated separately for each major stationary source for VOC, NO_x, or for both, using the method outlined in proposed §101.106, prior to any baseline amount aggregation for multiple major stationary sources. If an owner or operator of a major stationary source chooses to include emissions from VOC or NO_x that is not a major source in an aggregated baseline amount determination, Failure to Attain Fees will remain due on that pollutant. This separate initial calculation of baseline amount is intended to provide transparency and consistency in baseline amount determinations with any subsequent aggregation.

The proposed rule would allow owners or operators of major stationary sources to aggregate VOC and NO_x baseline amounts at a major stationary source. Sources under common ownership and/or control could also opt to aggregate baseline amounts across multiple major stationary sources. The aggregation methodology must remain consistent throughout the baseline amount calculation and Failure to Attain Fee obligation calculation. A source opting to aggregate baseline amounts must also aggregate emissions for Failure to Attain Fee calculations. The attainment year or same 24-month period would be required as a basis for the baseline amount calculation for all aggregated major stationary sources for each fee calculation. A separate 24-month period can be used for each pollutant if the pollutants are not aggregated.

§101.108, Alternative Baseline Amount

The proposed rule will allow owners or operators of major stationary sources to include in their baseline amount calculation the lower of either emissions that were authorized by December 31, 2007, or reported in either the 2007 emissions inventory or prior year emissions inventory, per §101.106(b), In lieu of using emissions rates authorized by December 31, 2007, in the baseline amount calculation, one or more of the following amounts may be substituted as discussed by: 1) the authorized emissions rates resulting from a permit application that was administratively complete by December 31, 2007, if final authorization had not been received by the attainment date; or 2) planned MSS permit applications submitted according to agency specified schedule. The alternative baseline amount determination is restricted to operators of major stationary sources who reported these emissions in the emissions inventory as required under §101.10. Under this proposed rule, operators of major stationary sources are not penalized for being compliant with TCEQ emissions reporting, permitting requirements, and procedures.

Some operators or operators of major stationary sources submitted administratively complete applications for authorizing previously unauthorized emissions prior to the close of the attainment year, 2007. To not penalize sources that were in the process of obtaining an authorization by the end of the attainment year, the commission is proposing to allow the emission limits established by permits that were administratively complete by the end of the attainment year, December 31, 2007, for determining the baseline amount.

Although some owners or operators from various industry sectors have obtained authorization for emissions from MSS activities for a number of years by use of a case-by-case new source review (NSR) permit or a permit by rule, many NSR permits have not included specific emissions limits for MSS activities. In 2005, the commission adopted amendments to §101.222 that added an affirmative defense for certain unauthorized emissions and enforcement discretion for certain periods of time that provided an incentive for owners and operators of both major and minor facilities in Texas to authorize emissions from MSS activities. Due to the large number of permittees expected to take advantage of this incentive, the commission established a schedule in §101.222(h) for various industry sectors to file applications for the period of 2007 to 2013. In 2011, Senate Bill (SB) 1134, 82nd Legislature, codified in Texas Health and Safety Code (THSC), §382.051962, extended the deadline in §101.222(h)(1)(E) for

certain oil and gas facilities from 2012 to 2014. Authorization via an applicable permit by rule as described in 30 TAC Chapter 106 was also available.

Although most owners and operators have submitted or will submit applications to authorize MSS emissions according to the schedule in §101.222(h), most owners and operators had not obtained an authorization for these emissions by the scheduled attainment date for the HGB one-hour ozone nonattainment area, November 15, 2007. However, as required in §101.10, owners or operators of sources in Texas were required to report annual emissions from MSS activities in the emissions inventory years prior to and including the attainment year. Because the FCAA, §185, requires the baseline to be the lower of the actual emissions or authorized emissions limits for the attainment year, some major stationary sources that were compliant with these commission rules regarding permitting of these activities could be restricted to using a lower permit allowable emissions level in their baseline amount determination than they otherwise would have been able to have authorized as a result of following the MSS permitting schedule.

The proposed approach aligns with the FCAA intent of comparing authorized with reported emissions to determine a baseline amount. This proposed rule would restrict the affected sources to use the first authorized emissions limits on permits issued after the attainment date for emissions units and MSS activities associated with applications filed prior to or in response to the schedule in §101.222 for determining their baseline amounts for MSS emissions activities that had not previously been authorized. The language in this section is intended to clarify how owners and operators who have filed an application but have not yet been issued a permit or who have not filed an application consistent with the schedule in §101.22(h) or THSC, §382.051962 can account for the emissions limits ultimately authorized after the attainment year due to the permitting application administrative process. The rule would allow an owner or operator to establish an amount of emissions from MSS activities by requesting an amount based on MSS emissions reported in the emissions inventory for the purpose of establishing the baseline amount for the fees. Further, all of the emissions for the baseline amount must have been reported as MSS emissions in the emissions inventory per the requirements of §101.10. In this manner, major stationary sources are not penalized for being compliant with TCEQ MSS emissions reporting and permitting requirements and procedures. Upon issuance of the first permit including authorization of emissions from MSS activities, the baseline amount will be adjusted to reflect the first authorized limit of emissions associated with MSS activities.

The proposed approach requires sources to calculate their MSS emissions separately for emissions units and MSS activities that were authorized after the end of the attainment year, 2007, from the remaining portion of the reported or allowable emissions for the major stationary source, providing the owner or operator of the major stationary source met all the requirements of §101.10 and §101.222. For example, a major stationary source reported 1,800 tons of emissions in the attainment year, of which 600 tons were reported in the emissions inventory as MSS emissions. As of the one-hour ozone nonattainment area's attainment date of November 15, 2007, the major stationary source had a permit for 1,250 tons, but MSS emissions were not included as part of that authorization. Per the schedule in §101.222, the major stationary source requested and received a permit authorizing 500 tons of MSS after the attainment date raising the total site-wide authorizations to 1,750 tons.

Under the proposed rule, emissions units and MSS activities must be directly compared. Reported emissions from MSS would be directly compared to the MSS authorization and, as required in FCAA, §185, the authorized emissions from the remaining emissions units would be directly compared with the reported emissions. In this example, the 500 tons allowable for MSS were lower than the 600 tons reported emissions from MSS, and the 500 tons were selected for a MSS baseline amount for those emissions units. For the remaining emissions units and routine emissions for the emissions units with a new MSS authorization, the 1,200 tons reported emissions are lower than the 1,250-ton authorization effective on the attainment date, and therefore, the 1,200 tons would be used for the baseline amount from these emissions units and MSS activities. These lower amounts would be combined, and the baseline amount would be 1,700 tons. The 1,700 tons baseline amount is lower than the 1,750 tons determined if actual and authorized emissions were totaled site-wide.

The calculation methodology included in this proposed rule allows consideration of the emissions limit established in response to emissions authorized in advance of the §101.222(h) schedule or in a timely application filed in accordance with the schedule in §101.222(h) for the baseline amount calculation for planned MSS if the owner or operator met the requirements of §101.10 and §101.222 and the emissions were not previously included in an authorization.

The proposed rule would require the baseline amount calculation and supporting documentation to be submitted to the agency on forms approved by the executive director. The baseline amount calculation would be subject to approval by the executive director.

A baseline amount is determined by each major stationary source that is a major source of VOC, NO_x, or both (depending on how the source is determined to be major) based on representative emissions or authorized emissions. Thus, the baseline amount would be a fixed value and would not be changed without the approval of the executive director except as consistent with §101.109 or as described in this section.

§101.109, Adjustment of Baseline Amount

The proposed new section would specify the limited circumstances in which baseline amounts may be adjusted. Emissions units may not always be under the same common ownership or control. For example, owners or operators of major stationary sources, as part of normal business, may transfer ownership of some or all of the equipment at a major stationary source to another major stationary source. The commission recognizes that a change in ownership or control of emissions units could change the Failure to Attain Fee obligation of both major stationary sources. The change in control of emissions units does not change the historical operation or reported emissions of the emissions units.

Under the proposed rule, a change in common control or ownership, such as with emissions unit transfer, would not affect the time period or amounts selected for the baseline amount on the remaining emissions units at either major stationary source. These baseline amounts would be calculated based on the operation of the emissions units at the attainment date, or for emissions that are cyclic, irregular, or otherwise varying, for the period preceding the attainment date.

In a manner similar to transferring other obligations that do not change with ownership transfer, such as emissions authoriza-

tions, the commission proposes to allow the affected major stationary sources to transfer the baseline amount and Failure to Attain Fee obligation associated with each emissions unit having a change in control without changing the calculated baseline amount for the transferred emissions units. In order to transfer the baseline amount and the Failure to Attain Fee obligations, the new owner or operator of each major stationary source affected by the change in common control would be required to submit a request within 90 days of the ownership change to the executive director for the executive director's approval.

§101.110, Baseline Amount for New Major Stationary Sources, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation

This proposed section would specify the limited circumstances in which baseline amounts may be determined or adjusted for stationary sources that became major (or were newly authorized) after the November 15, 2007 attainment date. Major stationary sources that began operation within one year of, or after, the applicable nonattainment area's attainment date may not have sufficient data to determine their baseline amount using reported emissions data. Additionally, sources that began operation after the applicable nonattainment area's attainment date would not have the applicable authorizations for such a determination.

Under this proposed rule, the TCEQ is also allowing an existing major stationary source to adjust its baseline amount to account for new construction authorized in a nonattainment permit issued under 30 TAC Chapter 116, Subchapter B, Division 5. These emissions units are required to provide emissions offsets prior to construction and are built with emission limits that are the lowest achievable emissions rate. The commission is requesting comment on the appropriateness of including changes in a baseline amount as a result of expansions at a major stationary source for new emissions units authorized under a nonattainment permit.

The TCEQ is also requesting comment regarding the appropriateness of exempting new emissions units authorized under a nonattainment permit from a Section 185 fee, and if exempted, how this exemption should impact the fee obligation from the HGB area. The commission is requesting suggestions on sources of revenue that may be needed to offset revenue that would have been collected from these exempted sources and how a clean unit should be defined.

The EPA, in its January 12, 2012, notice of proposed approval of the California SIP revision (77 FedReg 1875), proposed allowing a major stationary source subject to the FCAA, §185 rules after the attainment date in the SCAQMD to use actual emissions or authorizations (or holdings in its banking program) from its initial calendar year of operation. Similarly, the commission is proposing a rule that requires the source to make a determination on the lower of actual or allowable data available in its first year of operation as a major source.

Because data would not exist for newer sources at the time of the applicable nonattainment area's attainment date, the commission proposes to allow those sources to use their first year of actual operation (12 consecutive months) to make the baseline determination.

Major stationary sources new to the nonattainment area may not have sufficient data as a major stationary source to determine if emissions at that major stationary source are irregular, cyclical, or otherwise vary significantly from year to year. The first submitted emissions inventory may have been based on a partial year of operation. The proposed provisions of this section are intended to allow major sources with less than 24 months of continual operation at the time of the applicable nonattainment area's attainment date some additional flexibility in establishing the emissions history at their major stationary sources. The major stationary source may request that the baseline amount be based on the average rate within the first 24 months of continuous operation. If these emissions are varied significantly during 24 months of operation, these major stationary sources may be considered irregular, cyclical, or otherwise varying significantly. Under the proposed rules, a major stationary source would be allowed to request a modification to their baseline amount within 60 calendar days of completing 24 months of operation. The agency's use of a 24-month historical look-back period is shorter than the time allowed by the EPA under its rules for a cyclic determination, which provide for a two-in-ten or two-in-five year look-back period. The EPA published approval for a similar approach for new sources for SCAQMD in August 2012.

§101.113, Failure to Attain Fee Obligation

This proposed section outlines the method used to determine the Failure to Attain Fee obligation for VOC, NO_x, or both. If the major stationary source were major for just one pollutant, the Failure to Attain Fee obligation would apply for just the one pollutant, VOC or NO_x, unless the pollutant were used in an aggregated baseline amount per §101.107. If the major stationary source were major for both VOC and NO_x, the fee obligation would apply for both pollutants.

This proposed section also provides for the calculation of the Failure to Attain Fee for owners and operators of major sources in a nonattainment area that opt to aggregate VOC, NO_x, or both. The aggregation of VOC with NO_x may occur at one major stationary source or across multiple major stationary sources under common control. Because both pollutants were in the baseline amount, the Failure to Attain Fee would be due on actual emissions of both VOC and NO_x even if the major stationary source was not a major source for one of the pollutants.

The commission proposes to maintain consistency between the baseline amount and the fee obligation determination with this approach. An owner or operator of multiple sources under common control who chose to combine a single pollutant from multiple major stationary sources in a baseline amount calculation must aggregate actual emissions from that single pollutant in the fee payment. If an owner or operator opted to combine VOC with NO_x at a major stationary source, both VOC and NO_x must be aggregated for the fee payment. Similarly, owners or operators who chose to combine VOC and NO_x in a baseline amount calculation and to aggregate those pollutants across more than one major stationary source must combine actual VOC and NO_x emissions from all aggregated major stationary sources to determine the fee.

The total fee would be applicable to, and calculated for, each pollutant (VOC or NO_x) for which the major stationary source meets the requirements of §101.101. The fee obligation from VOC or NO_x emissions that are not qualified for baseline amount aggregation under §101.107 would remain separate and due from each major stationary source.

The fee for a pollutant aggregated under multiple major stationary sources for a baseline amount would be calculated based on the aggregated actual emissions from all the affected major stationary sources minus 80% of the aggregated baseline amounts for all major stationary sources as calculated in §101.107.

For example, if multiple major stationary sources were combined for determining the NO_x baseline amount, then the Failure to Attain Fee payment is based on all actual NO_x emissions from those combined major stationary sources. The fee payment for VOC would be considered separately for these major stationary sources. Similarly, if owners or operators chose to combine multiple major stationary sources into one baseline amount for VOC and NO_x, then the payment would be due from the combined major stationary sources for both pollutants together.

Actual emissions include emissions from annual operations, MSS operations and other events not otherwise authorized (emissions events). Inclusion of emissions events in the fee obligation is appropriate because the emissions contribute to the formation of ozone in the nonattainment area during the year that the fee is owed.

The FCAA, §185 requires the annual fee to be adjusted by the CPI and cross references the methodology in FCAA, §502(b)(3)(B)(3)(v). The method described in FCAA, §502 requires the fee to be adjusted annually per the CPI for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year. Because the FCAA, §185 requires these fees to be assessed on a calendar-year basis and the inflation factor based on the CPI is applied in September, the calendar year Failure to Attain Fee is determined as a weighted monthly average (two thirds of the fee associated with January to August and one third of the fee associated with September through December). Thus, a calendar 2012 fee would require two thirds of the annual CPI ending in August 2012 and one third of the annual CPI ending in August 2013.

§101.116, Failure to Attain Fee Payment

This section proposes that payment of Failure to Attain Fees must be made by check, certified check, electronic funds transfer, or money order made payable to the TCEQ. Payment must be sent to the TCEQ address printed on the billing statement within 30 calendar days of the invoice date.

FCAA, §185 requires that the Failure to Attain Fee be assessed on actual emissions, starting the first year after the attainment year, on emissions exceeding 80% of the approved baseline amount. For the HGB one-hour ozone nonattainment area, the first year after the attainment date is 2008 because the attainment year for the HGB one-hour ozone nonattainment area was 2007. However, assessing a Failure to Attain Fee for 2008 could be considered a retroactive rulemaking. Sources would not have had an opportunity to reduce emissions (and thus, fees) by adjusting processes or operations. Therefore, this proposed rule would assess the FCAA, §185 Failure to Attain Fee using the emissions inventory from the year prior to the rule adoption date. Thus, if the rule was adopted in 2013, the most current inventory would be for 2012. The first payment would be due for calendar year 2012 emissions and, annually, thereafter until the FCAA, §185 Failure to Attain Fee no longer applied to the area.

This proposed rule would allow the executive director to impose interest and penalties in accordance with 30 TAC Chapter 12 to owners or operators of major sources subject to the provisions of §101.101 who fail to make full payment of the Failure to Attain Fees when due.

Failure to Attain Fees would be due within 30 calendar days of the date on the invoice. That provision, along with others in this chapter, is consistent with the due date for invoices issued for other programs within the agency. Failure to Attain Fees would be due on actual emissions that exceed 80% of the established emission baseline amount.

§101.117, Compliance Schedule

This proposed section would require the submission of baseline amount emissions on a form prescribed by the executive director. For the HGB one-hour ozone nonattainment area, major sources would be required to submit their proposed baseline amount emissions to the executive director no later than 120 calendar days from rule adoption on forms or other media approved by the executive director. For sources that become major stationary sources after this rule is adopted, the TCEQ proposes rules to require owners or operators to submit a report on forms approved by the executive director establishing baseline amount emissions to the executive director no later than 90 days following the first full year (12 consecutive months) of operation as a major source.

A timely and accurate baseline amount is required from each applicable major stationary source to implement the required penalty fee program. If a major stationary source does not submit baseline amount data or does not submit the data in accordance with the rules of §§101.106, 101.107, or 101.018, the executive director may need to determine a baseline amount for that major stationary source. In accordance with the requirements of the FCAA, §185, authorized or baseline emissions data from the attainment year, 2007, will be used, if available, to establish a baseline amount. Emissions inventory data reported under §101.10 will be used. If no data are available, a baseline amount of 12.5 tons for VOC and 12.5 tons for NO_x will be used. The major stationary source threshold for an area classified severe for the one-hour ozone nonattainment area is 25 tons of potential emissions for VOC and 25 tons for NO_x. Potential emissions are typically higher than the annual emissions reported in the emissions inventory. FCAA, §185 requires the lower of actual or potential, so the executive director will use half the potential as an average baseline amount for a source with no data reported in the emissions inventory. Additionally, the executive director, using the plain language of FCAA, §185, will not use any alternatives for calculating a baseline amount, such as aggregating VOC and NO_x or aggregation of pollutants across multiple major stationary sources, because the executive director will not have all information necessary to make these determinations. Loss of these options will provide an additional incentive for sources to comply with all reporting obligations.

§101.118, Cessation of Program

The EPA does not clearly define the mechanism to end the Failure to Attain Fee program in an area with a revoked standard. FCAA §185 requires the fee payment to be due until the area is redesignated to attainment; however, the EPA has indicated that it will no longer redesignate areas under the revoked one-hour ozone standard. To address this issue, the TCEQ proposes mechanisms to end the Failure to Attain Fee program for the HGB one-hour ozone nonattainment area. The proposed new section would end the applicability of the Failure to Attain Fee upon either redesignation of the nonattainment area to attainment for the one-hour ozone NAAQS or a finding of attainment by the EPA for the one-hour ozone nonattainment area.

Additionally, to provide for timely cessation of the Failure to Attain Fee program, the Failure to Attain Fee may be assessed but the fee collection may be placed in abeyance by the executive director if three years of quality-assured data resulting in a de-

sign value that did not exceed the NAAQS are submitted to the EPA.

§101.119, Exemption from Failure to Attain Fee Obligation

This section proposes that no Failure to Attain fee payment is due for a year determined by the EPA to be an extension year under FCAA, §181(a)(5). The EPA may grant an extension year for a nonattainment area if all SIP obligations have been met and if one or fewer measured ozone exceedances occurred at any valid monitoring site in the nonattainment area in a year.

§101.120, Eligibility for Equivalent Alternative Obligation

This section proposes to allow major stationary sources owing a Failure to Attain Fee payment to fulfill the fee obligation with an equivalent alternative obligation in compliance with the requirements of this subchapter. If an equivalent alternative obligation does not fully meet a major stationary source or Section 185 Account's full obligation, the remaining portion of the Failure to Attain Fee remains due. If an alternative obligation under §101.121 is not approved and funded, exercised, or otherwise completed by the fee invoice date, the payment of the fee would be due in full. Because a Supplemental Environmental Project (SEP) may be a capital project requiring more than 30 days to complete, the proposed section requires SEPs to be approved and funded by the fee invoice date.

Within 15 days of the date of the letter of the fee invoice, an owner or operator of a Section 185 Account shall inform the commission on forms approved by the executive director if an equivalent option to the Failure to Attain Fee is being requested. All requests are subject to the executive director's approval.

§101.121, Equivalent Alternative Obligation

This section proposes to allow Section 185 Accounts to request to fulfill their Failure to Attain Fee obligation by relinquishing an equivalent portion of emission reduction credits, discrete emission reduction credits, current or banked Highly-Reactive Volatile Organic Compound (HRVOC) Emissions Cap and Trade (HECT) program allowances, or current or banked Mass Emissions Cap and Trade (MECT) program allowances.

Emission credits submitted for fee reduction purposes, on a ton-for-ton basis, would only be allowed for use as an equivalent alternative for the pollutant (VOC or NO_x) specified on the credit. VOC or HRVOC credits would only be used as an alternative equivalent for VOC tons in excess of the baseline; NO_x credits would only be used as an alternative equivalent for NO_x tons. The proposed use of allowances would be similarly restricted, such that MECT allowances would only be used as an equivalent for NO_x tons. HECT allowances would only be allowed for use as an equivalent for VOC tons in excess of the baseline amount for major stationary sources in Harris County. Significant digit rounding of the emissions reduction would correspond to the respective significant digit for emissions allowance in the emissions banking and trading program being used. For example, if the HECT allowance uses a significant digit of two places after the decimal point, then the emissions offset would be also limited to two digits after the decimal place. Removing these emissions, represented as allowances, on a ton-per-ton basis furthers the goals of reducing ozone-causing emissions in the atmosphere and meets the objective of improving air quality by reducing emissions more directly than imposing a fee.

§101.122, Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation

This section proposes to allow Section 185 Accounts to request to fulfill all or part of their fee obligation by contributing to a SEP within the HGB one-hour ozone nonattainment area in either an amount equivalent to the tons on which the fee has been assessed or in an amount equivalent to the fee amount assessed. SEPs are projects that prevent or reduce pollution beyond existing regulatory requirements. Supporting a SEP guaranteeing emissions reductions in the nonattainment area would provide cost-effective opportunities that more directly benefits air quality in the affected area than the imposition of a fee. Under this proposed rule, contributing to a SEP would reduce a major stationary source or Section 185 Account's fee obligation on a dollar-per-dollar basis by decreasing the fee obligation by the same amount. The proposed rule also allows a major stationary source or Section 185 Account to use surplus SEP funds from year to year. The funding will not be discounted or depreciated over time.

The proposed rule language only allows funding for air-related projects that are implemented in the HGB area. This proposed rule restricts SEPs to projects that offset the Failure to Attain Fee on a dollar-per-dollar basis. The established SEP program requires participants to submit quarterly and annual project reports with expenditure and project completion information, providing validation of actual emissions reductions or expenditures. Payment to the SEP must be approved by the due date of the fee; therefore, any SEP used for payment of the fee obligation must be approved by the date the fee payment is due.

The TCEQ is soliciting comments on whether additional requirements or restrictions should be placed on the use of SEP funds as an equivalent obligation under FCAA, §172(e).

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules would not have a significant fiscal impact on other state agencies since they do not typically engage in the type of activities that produce major emissions of VOC and NO_x. The proposed rules would not have a fiscal impact on units of local government that are major stationary sources of emissions in the HGB ozone nonattainment area if proposed credits offset the fee obligation.

The FCAA requires each SIP for ozone nonattainment areas classified as severe or extreme to include a requirement for the imposition of a penalty fee for major stationary sources of VOC located in an area if the area fails to attain the ozone NAAQS by the applicable attainment date. The FCAA further requires all SIP requirements that apply for VOC to also apply for emissions of NO_x. The Failure to Attain Fee is required to be imposed for each calendar year until the area is redesignated as an attainment area for ozone. The proposed rules would impose a Failure to Attain Fee on major stationary sources of VOC and NO_x located in ozone nonattainment areas if the area has failed to attain the ozone NAAQS by the applicable attainment date. The EPA is also allowing, subject to its approval, equivalent alternative programs to replace penalty fee programs if certain conditions are met.

The HGB area is the only area of the state that is classified as a severe nonattainment area for the one-hour ozone NAAQS and has failed to attain the standard by its attainment date. States have the choice to implement a FCAA, §185 fee in lieu of EPA

enforcement of the fee obligation. If a state does not implement the fee provision, the EPA is required to collect the fee and can also collect interest. The EPA would not be obligated to use any fee revenue or interest collected for the benefit of a state where such penalties are incurred. The fee would be $5,000 per ton (adjusted by the CPI to be $8,967 for calendar year 2010) on actual VOC or NO_x emitted in excess of 80% of a baseline amount, which is based upon the lower of total actual or authorized emissions at each major stationary source. This fiscal note assumes that EPA would allow the use of the proposed credits from the agency's TERP and the vehicle I/M programs to lower any assessed FCAA, §185 fee. For convenience, in separate paragraphs in each section of the fiscal note, the agency is also providing an estimate of the fiscal impact of FCAA, §185 fees if credits are not utilized.

In addition to the proposed equivalent alternatives, major sources in the HGB area could offset FCAA, §185 fees by retiring emission credits from the HECT and MECT programs or by providing funding for the implementation of a SEP, and the proposed rules would allow for these alternatives also. However, the agency cannot predict how many, or if any owners or operators of major stationary sources, would use emission credits or elect to implement a SEP, and the fiscal impact of these alternatives is not estimated in any part of this fiscal note.

The proposed rules include requirements for source applicability determination, emissions baseline calculation methodology, determination of the Failure to Attain Fee obligation required, and due dates for fee payment. The proposed rules also include equivalent alternatives allowed under the anti-backsliding provisions of FCAA, §172(e). These provisions include alternative methods for determining a baseline amount at a major stationary source or group of major stationary sources and equivalent methods of fulfilling the fee obligation. The proposed rules also establish a Fee Equivalency Account that credits the FCAA, §185 fee obligation with revenue collected from the HGB area from the TERP and the I/M programs. Approximately $33.8 million was collected in Fiscal Year 2011 for TERP and $89.1 million for I/M from the HGB area, and these amounts would be used to offset the FCAA, §185 fee obligation.

Impact to Agency Revenue

Currently, there are approximately 260 major stationary sources in the HGB ozone nonattainment area that are expected to be subject to the proposed rules. Assuming that the EPA allows the use of proposed credits for both TERP and I/M funds each year, no additional revenue would be collected under the proposed rules.

Impact to the Agency if TERP and I/M Credits are not Used

Agency Revenue

If any portion of HGB TERP or I/M funding is not approved as equivalent alternative fee revenue or if the amounts of TERP and I/M funding from the HGB area is insufficient, the remaining portion of the area's obligation will be met by assessing a fee on the major stationary sources. The fee will be prorated for each major stationary source, based on its annual actual emissions over its baseline amount. Revenue could increase by as much as $90 million per year as long as the area continues to be in nonattainment. This estimate assumes a fee level of $5,000 per ton, adjusted by the CPI (approximately $8,967 per ton) for 2010 emissions over a baseline amount. Under the proposed rules, the agency would collect and deposit penalty fee revenue into Account 151 - the Clean Air Account. The additional revenue would be unavailable for agency use unless it is appropriated by the legislature.

Agency Costs

The agency would use currently available resources to determine baseline amounts and assess and collect fees on an annual basis. As part of the agency's implementation of the proposed rules, an existing database would need to be enhanced and maintained to track baseline amounts and to determine the amount of the fee.

Impact to Local Government in the HGB Ozone Nonattainment Area:

If Credits Are Allowed

Examples of major stationary sources owned by local governments in the HGB one-hour ozone nonattainment area could include boilers at universities, sewerage facilities, landfills, and research facilities that have annual potential or actual emissions greater than the 25-ton per year threshold that defines a major source. At the current time, there are only two sewerage facilities owned by local government that exceed the 25-ton per year threshold. These facilities should experience no fiscal impacts under the proposed rules.

If Credits Are Disallowed

If credits for the TERP and I/M programs are not approved to offset the major source FCAA, §185 obligation, the agency estimates that one sewerage facility could be assessed a fee of $8,000 per year and the other could be assessed a fee of $115,000 per year. (This estimate assumes a fee on calendar year 2010 emissions, which are the most current emissions available for this estimate.) The proposed FCAA, §185 fee would be an estimated $8,967 per ton of VOC or NO_x emitted in excess of 80% of a baseline amount.

Public Benefits and Costs

Nina Chamness has also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be in compliance with federal law and a possible incentive for reductions of ozone in the HGB one-hour ozone nonattainment area.

Impact to Individuals and Businesses in the HGB One-Hour Ozone Nonattainment Area:

If Credits Are Allowed

The proposed rules would not have a fiscal impact on individuals or businesses in the HGB one-hour ozone nonattainment area. The 2010 HGB revenue is estimated to be $30 million for TERP and $86 million for I/M. This revenue could be used to fully offset the area's fee obligation, and no fee would be assessed on major stationary sources for a particular calendar year. However, TERP and I/M revenue can fluctuate, and fully offsetting the fee obligation may not be typical.

If Credits Are Disallowed

Individuals in the HGB one-hour ozone nonattainment area could experience cost increases under the proposed rules if major sources of VOC and NO_x (large businesses and some governmental entities) pass through the cost of any penalties they may be assessed.

The proposed rules are expected to have significant fiscal implications for some large businesses in the HGB one-hour ozone

nonattainment area if the proposed credits are not utilized or approved. There are approximately 260 major stationary sources in the HGB one-hour ozone nonattainment area impacted by the proposed rules, of which, 258 are thought to be owned by large businesses. Examples of these major sources are chemical plants, petroleum refineries, electric generating facilities, sewerage facilities, waste management facilities, and gas storage facilities. Using calendar year 2010 emissions as a basis for estimation, TCEQ staff estimate that a business could pay an average of $350,000 under the proposed rules if I/M and TERP revenue are not utilized. Under this scenario, staff estimates that the rate for one major stationary source could be as high as $7.4 million. If HGB TERP revenue, but not I/M revenue, are used as a credit against the FCAA, §185 Failure to Attain obligation, staff estimates that fees paid could average $186,000 per year for businesses with a high rate of $5.2 million for one business. If TERP revenue is not utilized and only the HGB I/M funds are used as a credit, Failure to Attain Fees are estimated to average $14,000 per year for businesses with a high rate of $296,000 for one business.

Small Business and Micro-business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since no small business is listed as a major source of VOC or NO_x in the HGB one-hour ozone nonattainment area. If a small business becomes a major source of these emissions, then it would be subject to the same conditions as a large business in the HGB one-hour ozone nonattainment area.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Additionally, the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The proposed rules are intended to enable Texas to comply with the requirements of the FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Fees are required to be collected for all major stationary sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may collect interest). The applicability of the fee may have a benefit in reducing emissions of ozone precursors in ozone nonattainment areas by incentivizing sources to reduce emissions further, but the proposed rules will not require emission reduction; and appear to have been designed primarily as a penalty for failure to attain the ozone standard.

The proposed rulemaking would implement requirements of the FCAA. Under 42 United States Code (USC), §7410(a)(2)(D), each SIP must contain adequate provisions prohibiting any source within the state from emitting any air pollutant in amounts that will contribute significantly to nonattainment of the NAAQS in any other state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter." The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under the FCAA, that must be included in their SIPs, such as the requirement of FCAA, §182 and §185, in order to avoid SIP disapproval or sanctions under the FCAA. The proposed rules would incorporate requirements to fulfill the requirements of FCAA, §182 and §185.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for

the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule is a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states have flexibility to develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP were considered a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. This proposed rulemaking will have no impact beyond the impact that is required by FCAA, §182 and §185. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *(See Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).)

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the Legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The proposed rulemaking does not exceed a standard set by federal law nor exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this proposed rulemaking. Finally, this proposed rulemaking was not developed solely under the general powers of the agency but is also authorized by THSC, §382.012. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet the definition of a "major environmental rule." Additionally, even if the rulemaking did meet the definition of a "major environmental rule" it does not meet any of the four applicability criteria for a major environmental rule.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the proposed rulemaking is to implement the FCAA, §182 and §185 fee requirement in the HGB ozone nonattainment area. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law and by state law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Ozone is a criteria pollutant that is regulated under the FCAA to protect public health and welfare. Fees are required to be collected under FCAA, §182 and §185, for all major sources in severe or extreme ozone nonattainment areas that do not attain the ozone standard by their attainment dates. If the fee is not imposed and collected by the state, then FCAA, §185(d) requires that the EPA shall impose and collect the fee (and may collect interest). The proposed rules will enable Texas to comply with the requirements of FCAA, §182 and §185 for the HGB one-hour ozone nonattainment area. Consequently, the proposed rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 101, Subchapter B is not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Houston in the Houston-Galveston Area Council at 3555 Timmons, Room A, on January 9, 2013, at 2:00 p.m. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Texas Register Team, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-009-101-AI. The comment period closes January 14, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Kathy Pendleton, P.E., Emissions Assessment Section, at (512) 239-1936.

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also proposed under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; TWC, §5.701, concerning Fees, that authorizes the commission to charge and collect fees prescribed by law; TWC, §5.702, concerning Payment of Fees Required When Due, that requires fees to be paid to the commission on the date the fee is due; TWC, §5.703, concerning Fee Adjustments, that specifies that the commission shall not consider adjusting the amount of a fee due if certain conditions are met; TWC, §5.705, concerning Notice of Violation, that authorizes the commission to issue a notice of violation to a person required to pay a fee for knowingly violating reporting requirements or calculating the fee in an amount less than the amount actually due; and TWC, §5.706, concerning Penalties and Interest on Delinquent Fees, that authorizes the commission to collect penalties for delinquent fees due to the commission. The new sections are also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7511a(d)(3), (e), and (f), regarding Plan Submissions and Requirements for ozone nonattainment plan revisions; and 42 USC, §7511d, regarding Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain.

The proposed new sections implement the requirements of THSC, §§382.002, 382.011, 382.012, and 382.017; TWC, §§5.701 - 5.703, 5.705, and 5.706; and FCAA, 42 USC, §7511a(d)(3), (e), and (f) and §7511d.

§101.100. Definitions.

The following terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise.

(1) Actual emissions--The actual emissions are as defined in §101.10(b) of this title (relating to Emissions Inventory Requirements).

(2) Area §185 obligation--The total annual amount of §185 fee due from all applicable major stationary sources in a severe or extreme ozone nonattainment area that failed to attain the one-hour ozone National Ambient Air Quality Standard by its applicable attainment date of November 15, 2007.

(3) Attainment date--The date an area is scheduled to attain the National Ambient Air Quality Standard for one-hour ozone, as documented in the state implementation plan. For the Houston-Galveston-Brazoria one-hour ozone nonattainment area, this is November 15, 2007.

(4) Attainment year--For the Houston-Galveston-Brazoria one-hour ozone standard, the attainment year is calendar year 2007.

(5) Baseline amount--Tons of volatile organic compounds and/or nitrogen oxides emissions calculated separately at a major stationary source, using data submitted to and recorded by the commission, under §101.106 of this title (relating to Baseline Amount Calculation).

(6) Baseline emissions--The baseline emissions are the emissions reported in tons in the annual emissions inventory submitted to and recorded by the agency each calendar year per the requirements of §101.10 of this title (relating to Emissions Inventory Requirements) adjusted as follows.

(A) The baseline emissions must include all annual emissions associated with authorized normal operations, startups, shutdowns, and maintenance activities and excludes emissions from emissions events reported.

(B) For regulated entities with emissions that are irregular, cyclic, or have emissions that vary, the baseline emissions may be determined from an average of a consecutive 24-month period as allowed under §101.106(b)(2) of this title (relating to Baseline Amount Calculation).

(7) Electric utility steam generating unit--Any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is included in determining the electrical energy output capacity of the affected facility.

(8) Emissions unit--An emissions unit as defined in §101.1 of this title (relating to Definitions).

(9) Equivalency credits--An amount equivalent to the revenue collected in accordance with §101.102 of this title (relating to Equivalent Alternative Fee) for accumulation in the Fee Equivalency Account.

(10) Extension year--A year as defined in Federal Clean Air Act, §181(a)(5).

(11) Major stationary source--A source as defined under §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions).

(12) Section 185 Account--The name of a group of one or more major stationary sources, under common control in the Houston Galveston-Brazoria one-hour ozone standard nonattainment area.

§101.101. Applicability.

The provisions of this subchapter apply to all regulated entities that are major stationary sources of volatile organic compounds or nitrogen oxides that are located in the Houston-Galveston-Brazoria one-hour ozone nonattainment area by the applicable attainment date of November 15, 2007.

§101.102. Equivalent Alternative Fee.

(a) Fee Equivalency Account. The executive director shall establish and maintain a Fee Equivalency Account to document fees collected and available for use in demonstrating equivalency with the Area §185 Obligation. No actual money will be deposited into the Fee Equivalency Account. Instead, the Fee Equivalency Account will reflect equivalency credits based upon revenue collected for:

(1) the Texas Emissions Reduction Plan program; and/or

(2) the Vehicle Inspection and Maintenance program.

(b) Revenue eligibility. The revenue eligible for credits to the Fee Equivalency Account will be from the Houston-Galveston-Brazoria one-hour ozone standard nonattainment area.

(c) Revenue credited. The revenue credited to the Fee Equivalency Account shall be collected from the calendar years subsequent to the scheduled attainment year.

§101.104. Equivalent Alternative Fee Accounting.

(a) Fee Equivalency Account credits. Equivalency Credits will be on a dollar-for-dollar basis and will not be discounted due to the passage of time. Equivalency Credits can be accumulated in the Fee Equivalency Account from year to year if a surplus exists in any given year and used to offset the calculated Houston-Galveston-Brazoria (HGB) one-hour ozone nonattainment area §185 Obligation as needed.

(b) Area Section 185 obligation determination. Annually, the executive director shall calculate the applicable Failure to Attain Fee Obligation for all major stationary sources in the HGB one-hour ozone standard nonattainment area. The Failure to Attain Fee Obligation for each Section 185 Account will be summed. The resultant amount will represent the calendar year Area §185 Obligation for the HGB one-hour ozone standard nonattainment area. A calendar year's Area §185 Fee Obligation will be calculated using actual emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) from the previous calendar year.

(c) Annual demonstration of equivalency. The executive director shall complete an equivalency demonstration to determine if adequate equivalency credits were available in the Fee Equivalency Account for the applicable calendar year to meet the Area §185 Obligation calculated under subsection (b) of this section.

(1) The annual determination of equivalency will be made as follows.

Figure: 30 TAC §101.104(c)(1)

(2) If the Fee Equivalency balance is calculated to be greater than or equal to zero in paragraph (1) of this subsection, the executive director shall not assess a §185 Failure to Attain fee on Section 185 Accounts for the year being assessed.

(3) If the Fee Equivalency Account balance is calculated to be less than zero in paragraph (1) of this subsection, the executive director shall assess a sufficient §185 Failure to Attain fee to fulfill the Area §185 Obligation. The amount due from each Section 185 Account will be prorated to generate sufficient revenue to meet the Area §185 Obligation. The proration will be calculated as follows.

Figure: 30 TAC §101.104(c)(3)

§101.106. Baseline Amount Calculation.

(a) For the purposes of this subchapter, the baseline amount must be computed as the lower of the following:

(1) total amount of baseline emissions; or

(2) total emissions allowed under authorizations, including authorized emissions from maintenance, shutdown, and startup activities, applicable to the source in the attainment year.

(b) For the purposes of this subchapter, the baseline emissions must be from:

(1) the attainment year; or

(2) if the regulated entity's emissions are irregular, cyclical, or otherwise vary significantly from year to year, any single 24-month consecutive period within a historical period preceding the calendar year containing the attainment year to compute an average baseline emissions amount (tons per year) for the major stationary source. If used, the historical period must be:

(A) ten years for non-electric utility steam generating units; or

(B) five years for electrical utility steam generating units.

(c) If a major stationary source uses a historical consecutive period as defined in subsection (b)(2) of this section, the baseline amount estimation will:

(1) use adequate data for calculating the baseline emissions units; and

(2) be adjusted downward to exclude any noncompliant emission that occurred while the source was operating above an emissions limitation that was legally enforceable during the consecutive 24-month period.

(d) When control or ownership of emission units changes during the attainment year, the emissions from those emission units will be attributed to the major stationary source with control or ownership of the emission unit on December 31st of the attainment year.

(e) A baseline amount, reported in units of tons, must be calculated separately for volatile organic compounds and for nitrogen oxides. The calculation must be made for each pollutant for which the source meets the major source applicability requirements of §101.101 of this title (relating to Applicability).

(f) The baseline amount calculation is subject to approval by the executive director. The baseline amount will be fixed and not be changed without the approval of the executive director except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) until the Failure to Attain Fee no longer applies to the area

as described under §101.118 of this title (relating to Cessation of Program).

§101.107. Aggregated Baseline Amount.

(a) Aggregation. Notwithstanding the requirements of §101.106 of this title (relating to Baseline Amount Calculation), a major stationary source of emissions that meets the applicability requirements of §101.101 of this title (relating to Applicability) after calculating each pollutant's emission baseline amount in accordance with this subchapter may choose to combine:

(1) volatile organic compounds (VOC) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources;

(2) nitrogen oxides (NO_x) emissions into a single aggregated pollutant baseline amount for multiple major stationary sources;

(3) emissions for both VOC and NO_x into a single aggregated pollutant baseline amount for a single major stationary source; and/or

(4) emissions for both VOC and NO_x into a single aggregated pollutant baseline amount for multiple major stationary sources.

(b) Pollutants aggregation. Pollutants in an aggregated amount must have:

(1) the same time period for calculating the baseline amount; and

(2) the same basis of either actual or authorized emissions to calculate the baseline amount.

(c) Section 185 Account reporting. An owner and or operator opting to combine VOC with NO_x and/or combine major stationary sources into one baseline amount shall identify all major stationary sources being aggregated under this section.

(d) Failure to Attain Fee obligation requirement. The fee obligation must be calculated in the same manner that an owner or operator elects to aggregate under this section.

§101.108. Alternative Baseline Amount.

(a) Alternative to setting a baseline amount under §101.106 of this title (relating to Baseline Amount Calculation), an owner or operator of a major stationary source, if qualified, may choose to set an alternative baseline amount under this section.

(1) For purposes of this subchapter, the alternative baseline amount is computed as the lower of the following:

(A) total amount of baseline emissions as calculated under §101.106(b) of this title reported in the emissions inventory; or

(B) emissions allowed under authorization. If reported in the emissions inventory prior to or during the attainment year as required under §101.10 of this title (relating to Emissions Inventory Requirements), total authorized emissions may include:

(i) the resulting authorized emissions from permit applications in process by the attainment year. The permit application for these unauthorized emissions must have been administratively complete by December 31, 2007, and the permit issued by the adoption date of this section; and

(ii) emissions from planned maintenance, startup, and shutdown (MSS) activities submitted in accordance with the schedule in §101.222(h) of this title (relating to Demonstrations) or Texas Health and Safety Code, §382.051962. This includes emissions that were:

(I) authorized or an application was filed in a timely manner in accordance with the schedule in §101.222(h) of this title and a permit issued under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or by claiming or registering under a permit by rule under Chapter 106 of this title (relating to Permits by Rule) by the applicable deadline. An owner or operator will establish an amount of emissions from MSS activities based on emissions limits from MSS activities in the permit for the purpose of establishing the baseline; or

(II) included in an application timely filed in response to the schedule in §101.222(h) of this title, which remains under review by the commission or are not authorized or included in an application because the schedule in §101.222(h) of this title or THSC, §382.051962 provides for a future date for submitting the application. An owner or operator shall establish an amount of emissions from planned MSS activities based on emissions from MSS activities reported in the emissions inventory as required under §101.10 of this title for the purpose of establishing the baseline.

(2) Additionally, only emissions from first authorized planned MSS activities may be used to adjust a baseline amount. The baseline amount will be adjusted to reflect the lower of the MSS emissions in the emissions inventory or the authorized limits for the MSS activities. This revised baseline amount will remain effective beginning with the year the permit was authorized.

(3) The baseline amount for the major stationary source is determined by selecting the emissions limits on permits issued after the attainment year for the previously unauthorized emissions units and/or MSS activities separately from the remaining units and activities at the regulated entity's major stationary source as follows.

(A) The baseline amount for the previously unauthorized emissions and emissions units for which emissions limits were authorized after the attainment year or any emissions limits from MSS activities will be the lower of the emissions reported in the emissions inventory for the emissions units or emissions authorized by permits for which the application was administratively complete by December 31, 2007 and applications filed prior to or in response to the schedule in accordance with §101.222(h) of this title or THSC, §382.051962 for the emissions units.

(B) The baseline amount for all other emissions units and any MSS activities not included in subparagraph (A) of this paragraph at the major stationary source will be the lower of the baseline emissions reported in the emissions inventory for these emissions units and the applicable emissions limits authorized prior to December 31, 2007.

(C) The baseline amount for the major stationary source will be determined by combining the lower amounts determined in accordance with subparagraphs (A) and (B) of this paragraph.

(b) A baseline amount, reported in tons per year, must be calculated separately for emissions from volatile organic compounds and for nitrogen oxides. The calculation must be made for each pollutant for which the site meets the major source applicability requirements of §101.101 of this title (relating to Applicability).

(c) When control or ownership of emissions units changes during the attainment year, the emissions from those emissions units will be attributed to the owner or operator of the major stationary source who has control or ownership of the emission unit on December 31st of the attainment year.

(d) Except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) or as required by subsection (a)(2) of this section, the baseline amount will be fixed and not be changed

without the approval of the executive director until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

§101.109. Adjustment of Baseline Amount.

(a) The owner or operator of a Section 185 Account may request adjustment of their baseline amount if ownership and operation of emissions units is no longer under common ownership or control. Adjustments to the baseline amount are limited as follows:

(1) The baseline amount, as calculated and reported for all equipment no longer under common ownership or control will be transferred from the original reporting Section 185 Account to the new Section 185 Account without modification to the reported amount; and

(2) Baseline amounts for remaining equipment at a Section 185 Account will not be adjusted based on a change of ownership or control of emissions units to or from a Section 185 Account.

(b) Within 90 calendar days of the effective date of a change of ownership or control emissions units, the owner or operator of each Section 185 Account affected by the change in ownership or control of emissions units in an area meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report requesting its adjustment of the baseline amount on a form published by the executive director.

(c) The baseline amount adjustment request is subject to approval by the executive director. After approval, it will be fixed and not change except as allowed under this section without the approval of the executive director until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

§101.110. Baseline Amount for New Major Stationary Sources, New Construction at a Major Stationary Source, or Major Stationary Sources with Less Than 24 Months of Operation.

(a) Baseline amount. A baseline amount may be established for major stationary sources after the attainment date as follows.

(1) If a major stationary source did not meet the applicability requirements in §101.101 of this title (relating to Applicability) on the attainment date of November 15, 2007, a major stationary source may establish a baseline amount based on the first full year of operation in accordance with the requirements of this subchapter.

(2) A major stationary source may include emissions limits from new emissions units authorized after the attainment date in its baseline amount determination if those emissions units were authorized by a nonattainment new source review permit, issued under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review Permits).

(b) Baseline amount reporting. Within 90 calendar days of completing one full calendar year of operation, the owner or operator of each major stationary source in an area meeting the requirements of §101.101 of this title shall submit to the executive director a report establishing its baseline amount on a form published by the executive director. The baseline amount is the lower of:

(1) the first full year of baseline emissions; or

(2) emissions allowed under applicable authorizations.

(c) For purposes of this subchapter, the emissions considered for the baseline amount for a new unit or units are restricted to the emissions units without a previously established baseline amount.

(d) Adjustment. The baseline amount as established under subsection (b) of this section may be adjusted for major stationary sources meeting the applicability requirements in §101.101 of this title if the major stationary source or emissions units at the major stationary source experienced less than 24 months of consecutive operation by the area's attainment date or later. The adjusted baseline amount must be reported on a form published by the executive director within 90 calendar days of completing 24 months of operation. The adjusted baseline amount must be computed for the applicable emissions units and major stationary source as allowed under subsection (b) of this section as the lower of the following:

(1) total average amount of baseline emissions for the 24-month period; or

(2) emissions allowed under authorizations applicable to the major stationary source in the attainment year.

(e) Approval. The adjusted baseline amount calculation is subject to approval by the executive director. Baseline amounts will be fixed and not change except as allowed under §101.109 of this title (relating to Adjustment of Baseline Amount) without the approval of the executive director until the Failure to Attain Fee no longer applies for the area as described under §101.118 of this title (relating to Cessation of Program).

§101.113. Failure to Attain Fee Obligation.

(a) Pollutant applicability. The total fee is applicable to and calculated for each pollutant, volatile organic compounds (VOC), nitrogen oxides (NO_x), or both, for which the major stationary source meets the requirements of §101.101 of this title (relating to Applicability). Actual VOC or NO_x emissions may be kept separate or aggregated together. A single pollutant may be aggregated across multiple major stationary sources, or both VOC and NO_x may be aggregated together across multiple major stationary sources. Aggregation is limited to emissions from:

(1) major stationary sources that aggregated VOC baseline amounts under §101.107 of this title (relating to Aggregated Baseline Amount);

(2) major stationary sources that aggregated NO_x baseline amounts under §101.107 of this title; or

(3) major stationary sources that aggregated VOC with NO_x baseline amounts under §101.107 of this title.

(b) Obligation. The owner or operator of each major stationary source to which this rule applies shall pay a fee to the commission computed in accordance with subsection (d) of this section. Payment of all fees must be paid in accordance with §101.116 of this title (relating to Failure to Attain Fee Payment). The fee will be assessed on actual emissions that exceed 80% of the pollutant baseline amount. The fee is due until the Failure to Attain Fee no longer applies to the area as described under §101.118 of this title (relating to Cessation of Program).

(c) Separate pollutant obligation. Fee obligation from VOC or NO_x emission major stationary sources not qualified or chosen for baseline aggregation under §101.107 of this title will remain separate and due from each major stationary source. The fee will be calculated by the method described in subsection (d) of this section.

(d) Calculation of fee for emissions. The fee will be calculated in accordance with the method used for a baseline amount determination.

(1) If VOC are aggregated under §101.107(a) of this title, VOC emissions from all major stationary sources in the Section 185 Account must be used for aggregated actual emissions and the aggregated baseline emissions.

(2) If NO_x are aggregated under §101.107(a) of this title, NO_x emissions from all major stationary sources in the Section 185

Account must be used for the aggregated actual and aggregated baseline emissions.

(3) If VOC are aggregated with NO_x at one major stationary source under §101.107(a) of this title, VOC and NO_x emissions must be used for the aggregated actual and aggregated baseline emissions. If VOC are aggregated with NO_x across multiple major stationary sources, VOC and NO_x emissions from each major stationary source in the Section 185 Account must be used for the aggregated actual and aggregated baseline emissions. The fee will be calculated for VOC, NO_x, or both, as follows.

Figure: 30 TAC §101.113(d)(3)

§101.116. Failure to Attain Fee Payment.

(a) Payment. Payment of fees required by this subchapter must be paid by check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ), and sent to the TCEQ address printed on the billing statement.

(b) When Failure to Attain Fee begins. The first payment of the fee is due and is calculated using the actual emissions from the emissions inventory for the calendar year preceding the adoption date of this section.

(c) First payment date for sources that were not major on the attainment date. The first payment of the fee is due and is calculated using the actual emissions from the emissions inventory for the later of:

(1) the first calendar year the source becomes a major source; or

(2) the calendar year preceding the adoption date of this section.

(d) Nonpayment of fees. Each emissions fee payment must be paid at the time and in the manner and amount provided by this subsection. Failure to pay the full emissions fee by the due date will result in enforcement action under Texas Water Code (TWC), §7.178. The provisions of TWC, §7.178, as first adopted and amended thereafter, are and will remain in effect for purposes of any unpaid fee assessments, and the fees assessed in accordance with such provisions as adopted or as amended remain a continuing obligation.

(e) Late payments. The agency will impose interest and penalties on owners or operators of Section 185 Accounts who fail to make payment of emissions fees when due in accordance with Chapter 12 of this title (relating to Payment of Fees).

§101.117. Compliance Schedule.

(a) Baseline amount determination. The owner or operator of each major stationary source meeting the requirements of §101.101 of this title (relating to Applicability) shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director. The Baseline Amount Determination forms for the Houston-Galveston-Brazoria one-hour ozone nonattainment area are due no later than 120 calendar days after the adoptions date of this rule.

(b) New major source baseline amount reporting. No later than 90 calendar days following the first full year of operation as a major source, the owner and/or operator of a major stationary source that meets the requirements of §101.101 of this title shall submit to the executive director a report establishing its baseline amount emissions on a form published by the executive director.

(c) The executive director shall determine a baseline amount for any major stationary source subject to §101.101 of this title that fails to submit an approvable baseline amount by the due date requested by the commission.

(1) The executive director-determined baseline amount shall be 12.5 tons for volatile organic compounds and 12.5 tons for nitrogen oxides, or, if available, the lower of the baseline emissions reported under §101.10 of this title (relating to Emissions Inventory Requirements) or authorized for the major stationary source for 2007.

(2) The executive director shall not aggregate baseline amounts under §101.107 of this title (relating to Aggregated Baseline Amount) or consider maintenance, startup, or shutdown emissions as allowed under §101.108 of this title (relating to Alternative Baseline Amount) in determining a baseline amount under this subsection.

(d) Payment due date. The fee payment is due no later than 30 calendar days after the invoice date. If an account commences or resumes operation during the fiscal year in which the fee is assessed, the full emissions fee payment will be due prior to commencement or resumption of operations.

§101.118. Cessation of Program.

(a) The Failure to Attain Fee will continue to apply until one of the following actions is final:

(1) redesignation of the Houston-Galveston-Brazoria one-hour ozone nonattainment area by the United States Environmental Protection Agency (EPA) to attainment; or

(2) finding of attainment by the EPA.

(b) Notwithstanding subsection (a) of this section, the Failure to Attain Fee will be calculated but not invoiced, and the fee collection may be placed in abeyance by the executive director if three consecutive years of quality-assured data resulting in a design value that did not exceed the National Ambient Air Quality Standard are submitted to the EPA. Fee collection will remain in abeyance until the EPA takes final action on its review of the certified monitoring data.

§101.119. Exemption from Failure to Attain Fee Obligation.

No owner or operator of a Section 185 Account shall be required to pay a fee during any year that has been determined by the United States Environmental Protection Agency to be an extension year under Federal Clean Air Act, §181(a)(5).

§101.120. Eligibility for Equivalent Alternative Obligation.

(a) Alternative option. Notwithstanding any requirement in this subchapter, the owner or operator of Section 185 Accounts obligated to pay a Failure to Attain Fee may submit a request to the executive director to partially or completely fulfill the Failure to Attain Fee obligation with an equivalent alternative obligation in compliance with the requirements with §101.121 and §101.122 of this title (relating to Equivalent Alternative Obligation and Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation, respectively).

(1) A Failure to Attain Fee obligation from volatile organic compounds (VOC) or nitrogen oxides (NO_x) emissions from Section 185 Accounts not fulfilled under this section will remain separate and due from each regulated entity.

(2) Fee obligation from VOC and/or NO_x emissions not fulfilled under this section will be calculated by the method described in §101.113 of this title (relating to Failure to Attain Fee Obligation).

(b) Failure to Attain Obligation. The entire Failure to Attain Fee obligation is due in accordance with §101.117 of this title (relating to Compliance Schedule) for all Section 185 Accounts not meeting the requirements of §101.121 and §101.122 of this title.

(c) Notification Requirements. Upon receipt of notification from the executive director regarding the Failure to Attain Fee obligation calculated in accordance with §101.113 of this title, an owner or operator of a Section 185 Account shall inform the executive director of their selection for the payment if an equivalent alternative obligation will be used to partially or fully meet a Failure to Attain Fee obligation.

(1) The owner or operator of a Section 185 Account must inform the executive director if they are selecting an equivalent alternative obligation using forms approved by the executive director.

(2) The owner or operator of a Section 185 Account must submit a form selecting their equivalent alternative obligation that lists the tons of each pollutant that will meet the fee obligation with the alternative obligation.

(3) The form must be received by the executive director no later than 15 calendar days from the date on the letter the Failure to Attain Fee invoice was sent to the Section 185 Account regulated entity.

(4) No later than 30 calendar days from the date on the letter the Failure to Attain Fee invoice was sent to the Section 185 Account:

(A) All equivalent alternatives under §101.121 of this title must be approved, exercised, or otherwise completed.

(B) All Supplemental Environmental Projects under §101.122 of this title must be approved and funded.

(5) If the executive director does not receive notification of a selection of equivalent alternative obligation and the equivalent alternative obligation is not approved and funded, exercised, or otherwise completed, the fee payment will be due in full under the provisions of §101.116 of this title (relating to Failure to Attain Fee Payment).

§101.121. Equivalent Alternative Obligation.

(a) The owner or operator of a Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its §185 Failure to Attain Fee obligation by substituting emission reductions, on a volatile organic compounds or nitrogen oxides specific basis, in an amount equivalent to the tons on which the Failure to Attain Fee has been assessed by relinquishing an equivalent amount of any combination of:

(1) emissions reduction credits;

(2) discrete emission reduction credits;

(3) current or banked Highly-Reactive Volatile Organic Compound Emissions Cap and Trade program allowances; or

(4) current or banked Mass Emissions Cap and Trade program allowances.

(b) The use of the provisions of this section to fulfill a Failure to Attain Fee obligation is subject to approval by the executive director.

§101.122. Using Supplemental Environmental Project to Fulfill an Equivalent Alternative Obligation.

(a) The owner and/or operator of a Section 185 Account subject to this subchapter may submit a request to partially or completely fulfill its Failure to Attain Fee obligation by contributing to a Supplemental Environmental Project (SEP), on a volatile organic compounds (VOC) or nitrogen oxides (NO_x) specific basis by either:

(1) an amount equivalent to the tons on which the Failure to Attain Fee has been assessed; or

(2) an amount equivalent to the Failure to Attain Fee amount assessed.

(b) The SEP must directly reduce the amount of VOC and/or NO_x emissions in the Houston-Galveston-Brazoria one-hour ozone nonattainment area.

(c) The use of SEP funds must be on a dollar-for-dollar basis and shall not be discounted due to the passage of time. SEP funds may be accumulated from year to year, and if a surplus exists in any given year, the funds may be used to offset the calculated Failure to Attain Fee as needed.

(d) The use of a SEP to fulfill a Failure to Attain Fee obligation is subject to approval by the executive director.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205937
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 239-0779

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER B. NATURAL GAS

34 TAC §§3.11, 3.12, 3.14, 3.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Comptroller of Public Accounts proposes the repeal of §3.11, concerning penalty and interest, §3.12, concerning purchaser and/or processor reporting requirements, §3.14, concerning exemption of certain interest owners from gas occupation taxes, and §3.16, concerning reports, payments, and due dates. The sections will be immediately reproposed under §§3.25, 3.26, 3.27, and 3.28 respectively. The repeals and new sections are being proposed to make available additional section numbers for Chapter 3, Subchapter A.

John Heleman, Chief Revenue Estimator, has determined that repeal of the rules will not result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined the repeals would benefit the public by improving the administration of natural gas taxation. There would be no anticipated significant economic cost to the public. The repeals are proposed under Tax Code, Title 2, and do not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeals.

Comments on the repeals may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas

78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeals are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeals implement Tax Code, Chapter 201.

§3.11. Penalty and Interest.

§3.12. Purchaser and/or Processor Reporting Requirements.

§3.14. Exemption of Certain Interest Owners from Gas Occupation Taxes.

§3.16. Reports, Payments, and Due Dates.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 13, 2012.

TRD-201205885
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §§3.25 - 3.28

The Comptroller of Public Accounts proposes new §3.25, concerning penalty and interest, §3.26, concerning purchaser and/or processor reporting requirements, §3.27, concerning exemption of certain interest owners from gas occupation taxes, and §3.28, concerning reports, payments, and due dates. The new sections take the place of §§3.11, 3.12, 3.14, and 3.16 respectively. Those sections are proposed for repeal elsewhere in this issue. The repeals and new sections are being proposed to make available additional section numbers for Chapter 3, Subchapter A. Only non-substantive changes have been made to the new §3.28 for general readability and to reflect the new section numbers referenced.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by improving the administration of natural gas taxation. These rules are proposed under Tax Code, Title 2, and do not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the new sections may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

These new sections are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new sections implement Tax Code, Chapter 201.

§3.25. Penalty and Interest.

(a) Penalty and interest will not apply to additional value that results from retroactive price increases or retroactive adjustments to value, provided that the additional tax is remitted on or before the 20th day of the second month that follows the month in which such price or value was determined. The taxpayer must notify the comptroller of any tax that is not subject to penalty and interest.

(b) The gas purchaser is responsible for any tax, penalty, and interest that accrues on gas that the purchaser takes whenever the proceeds are not disbursed to the interest owners, unless the producer is solely liable for the tax.

§3.26. Purchaser and/or Processer Reporting Requirements.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) First purchaser--Any person purchasing gas and/or condensate from a producer.

(2) Processor--Any person processing gas, under contract or other arrangement with a producer, for the purpose of extracting liquid hydrocarbons or other products from the gas.

(b) Persons required to file the purchaser/processor report.

(1) All first purchasers taking delivery of gas on the lease from which the gas was produced must file the purchaser/processor report. All first purchasers of condensate must file the purchaser/processor report.

(2) All processors processing gas and taking delivery on the lease from which the gas was produced must file the purchaser/processor report.

(c) Information required to be reported.

(1) The first purchaser must report the following:

(A) the name of the operator of the lease, unless the purchase is being made from an interest owner taking in-kind, in which case the name of the interest owner shall be reported;

(B) the name of the lease;

(C) the volume purchased;

(D) the entire value paid to the producer excluding severance tax reimbursement; and

(E) the value upon which the purchaser remits tax.

(2) The processor must report the following:

(A) the name of the operator of the lease, unless gas is being processed for an interest owner taking in-kind, in which case the name of the interest owner shall be reported;

(B) the name of the lease;

(C) the total volume processed;

(D) the entire value, excluding severance tax reimbursement, paid to the producer by the processor for the gas stream processed;

(E) the value upon which the processor remits tax; and

(F) if products are being taken in-kind by the producer.

§3.27. Exemption of Certain Interest Owners from Gas Occupation Taxes.

(a) Mineral and/or royalty interests owned by the federal government and its subdivisions and the State of Texas and its subdivisions are not subject to the gas occupation tax.

(1) Subdivisions of the federal government include, but are not limited to, the following:

(A) the Federal Land Bank;

(B) the Department of the Interior;

(C) the Bureau of Land Management; and

(D) the Army Corps of Engineers.

(2) Subdivisions of the State of Texas include, but are not limited to, the following:

(A) Texas cities, towns, and villages;

(B) Texas counties;

(C) Texas independent and common school districts; and

(D) Texas public colleges and universities.

(b) The tax on production from properties with an ownership interest exempt from tax, such as state royalty, shall be due from the nonexempt interest owners in the same proportion that the nonexempt owners share the net proceeds (wellhead value) from the sale of the production.

(c) For example, 10,000 MMBTU (million British thermal units) are sold for $2.00 per MMBTU or $20,000 gross proceeds. There is a state royalty interest (exempt from tax) paid on gross proceeds and the working interest (not exempt from tax) has incurred $5,000 transportation and processing fee.
Figure: 34 TAC §3.27(c)

§3.28. Reports, Payments, and Due Dates.

(a) Reports required.

(1) All first purchasers and/or processors must file reports in accordance with §3.26 of this title (relating to Purchaser and/or Processor Reporting Requirements).

(2) All producers as defined by Tax Code, §201.001(5) or §3.17 of this title (relating to Producer Reporting Requirements), having an average monthly tax liability of $200 or more must file the producer's monthly report required by Tax Code, §201.203.

(3) All producers having an average monthly tax liability of less than $200 must file the producer's annual report.

(b) Due dates.

(1) Except as provided in paragraphs (2) and (3) of this subsection, the due date for all monthly reports and payments is the 20th day of the second month following the month of production.

(2) The due date for the monthly reports and payments for the production month of June of each odd-numbered calendar year is the 15th day of August of that year.

(3) An estimated payment of tax is required of all monthly filers on or before August 15 for the production month of July of each odd-numbered calendar year.

(4) Except as provided in paragraphs (5) and (6) of this subsection, the gas producer's annual report and payment are due on or before February 20 of each year. The report is for taxable production during the preceding calendar year.

(5) The gas producer's annual report and payment for producers going out of business during the year are due on or before the 20th day of the second month in which the producer ceases production. The report must reflect all taxable production thus far during the year.

(6) If any producer, designated as an annual filer, has an accumulated tax liability of $2,400 or more the producer must file a report and remit the tax due on or before the 20th day of the second month following the month resulting in the $2,400 accumulated liability. The producer must file monthly thereafter. It is the responsibility of the taxpayer to contact the comptroller's office concerning the change in reporting status. Example: a producer begins business in April and estimates his monthly liability at only $150 per month. By October the actual liability is $2,500. A report covering April through October must be filed on or before December 20. All periods subsequent to October must then be reported on monthly reports.

(c) Payment of estimated tax required.

(1) An amount equal to a reasonable estimate of the tax due for production during July of each odd-numbered calendar year must be remitted to the comptroller on or before August 15 of that year.

(2) A reasonable estimate of the tax due for July is equal to the tax due for June of the same year or the actual tax due for July, whichever is less.

(3) Any additional tax due for July in excess of the reasonable estimate is due on or before September 20 of that year.

(d) Penalties.

(1) If the amount paid pursuant to subsection (c) of this section is less than the required amount, a penalty of 10% will accrue on the difference between the required amount and the amount actually remitted.

(2) If an estimated payment is not timely or no estimated payment is made, a 10% penalty will accrue on the entire amount required to be paid by August 15.

(3) A penalty of 5.0% will accrue on the additional tax due for the month of July or any other regular monthly report if it is not paid when the report is due. An additional 5.0% penalty will accrue 30 days after the due date of the report if the tax is still not paid.

(e) Examples.
Figure: 34 TAC §3.28(e)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 13, 2012.

TRD-201205886
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 3. PUBLIC INFORMATION
SUBCHAPTER B. ACCESS TO OFFICIAL RECORDS

43 TAC §3.12

The Texas Department of Transportation (department) proposes amendments to §3.12, concerning access to official records.

EXPLANATION OF PROPOSED AMENDMENTS

Section 3.12(e) lists the employees of the department who are authorized to certify official records of the department. Paragraph (1) of that subsection specifically applies to the certification of the minute orders of the Texas Transportation Commission (commission). In the recent reorganization of the department, titles and duties of employees were changed throughout the department.

Amendments to §3.12(e)(1) update the paragraph to accurately reflect the titles of the employees who are currently authorized to certify the commission's minute orders. Since 1996 the rules have authorized the department's chief minute clerk or, in the clerk's absence, the executive assistant to the deputy executive director to certify the commission's minute orders. After departmental reorganization, duties formerly performed by the chief minute clerk are now performed by the assistant chief clerk and duties performed for the commission by the executive assistant to the deputy executive director are now performed by the chief clerk to the commission. The amendments clarify that the commission's minute orders may be certified by either the chief clerk to the commission or assistant chief clerk.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Jeff Graham, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Graham has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be clarity in and accuracy of the commission's rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §3.12 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "§3.12." The deadline for receipt of comments is 5:00 p.m. on December 31, 2012. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.501.

§3.12. Public Access.

(a) - (d) (No change.)

(e) Certified records. In accordance with Transportation Code, §201.501, the following officials shall serve as the executive director's authorized representatives for the purpose of certifying official department records.

(1) The department's chief clerk to the commission or assistant chief [~~minute~~] clerk may certify commission minute orders. [~~In the absence of the chief minute clerk, minute orders may be certified by the executive assistant to the deputy executive director.~~] The executive director may delegate certification authority to other officials to assure sufficient availability of authorized certifying officials.

(2) Other official records of the department may be certified by the district engineer, division director, regional director, or other department official having official custody of the records. A district engineer, division director, or regional director may delegate certification authority to other officials to assure sufficient availability of authorized certifying officials.

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205950
Jeff Graham
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 30, 2012
For further information, please call: (512) 463-8683

♦ ♦ ♦

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §355.8203

The Texas Health and Human Services Commission withdraws the proposed new §355.8203, which appeared in the August 24, 2012, issue of the *Texas Register* (37 TexReg 6409).

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205969
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 16, 2012
For further information, please call: (512) 424-6900

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.19

The Texas Department of Housing and Community Affairs withdraws the proposed repeal of §1.19 which appeared in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7339).

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205927
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 15, 2012
For further information, please call: (512) 475-3916

♦ ♦ ♦

10 TAC §1.19

The Texas Department of Housing and Community Affairs withdraws the proposed new §1.19 which appeared in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7340).

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205926
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: November 15, 2012
For further information, please call: (512) 475-3916

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3044

The Comptroller of Public Accounts withdraws the proposed amendment to §9.3044 which appeared in the October 12, 2012, issue of the *Texas Register* (37 TexReg 8160).

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205933
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: November 15, 2012
For further information, please call: (512) 475-0387

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 2. MEDICAID VISION CARE PROGRAM

1 TAC §354.1015, §354.1021

The Texas Health and Human Service Commission (HHSC) adopts amended §354.1015, concerning Benefits and Limitations, and §354.1021, concerning Additional Claims Information Requirements, without changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7246) and will not be republished.

Background and Justification

HHSC adopts the amendments to add axis changes as a condition that will allow clients to receive vision services more frequently than the benefit limitations allow and to clarify the claims criteria for vision care services. HHSC reviewed the vision policies of other state Medicaid programs and private insurance carriers and determined that axis changes are an acceptable condition under which earlier replacement of eyewear should be allowed.

Comments

The 30-day comment period ended October 14, 2012. During this period, HHSC received comments regarding the proposed rules from the Texas Optometric Association and an individual optometrist. A summary of the comments and HHSC's response follow.

Comment: Both commenters were in support of the proposed amendments and provided written recommendations for axis measurement changes.

Response: HHSC worked closely with the Texas Optometric Association and reviewed other states' benefits specific to axis changes during the policy review. HHSC did not revise the proposed rule language in response to the comments.

Statutory Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205970
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 6, 2012
Proposal publication date: September 14, 2012
For further information, please call: (512) 424-6900

♦ ♦ ♦

CHAPTER 363. TEXAS HEALTH STEPS COMPREHENSIVE CARE PROGRAM

SUBCHAPTER E. EPSDT EYEGLASS PROGRAM

1 TAC §363.502

The Texas Health and Human Service Commission (HHSC) adopts amended §363.502, concerning Benefits and Limitations in the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) eyeglass program for children, without changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7248) and will not be republished.

Background and Justification

HHSC adopts the amendment to add axis changes as a condition that will allow clients to receive vision services more frequently than the benefit limitations allow. HHSC reviewed the vision policies of other state Medicaid programs and private insurance carriers and determined that axis changes are an acceptable condition under which earlier replacement of eyewear should be allowed.

Comments

The 30-day comment period ended October 14, 2012. During this period, HHSC received comments regarding the proposed rule from the Texas Optometric Association and an individual optometrist. A summary of the comments and HHSC's response follow.

Comment: Both commenters were in support of the proposed amendment and provided written recommendations for axis measurement changes.

Response: HHSC worked closely with the Texas Optometric Association and reviewed other states' benefits specific to axis changes during the policy review. HHSC did not revise the proposed rule language in response to the comments.

Statutory Authority

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205971
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 6, 2012
Proposal publication date: September 14, 2012
For further information, please call: (512) 424-6900

♦ ♦ ♦

TITLE 10 COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.5

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Subchapter A, §1.5, concerning Previous Participation Reviews, without changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7434) and will not be republished.

The new section contains a process for previous participation reviews and is moved to this chapter from 10 TAC Chapter 60, Compliance Administration, as part of a departmental rule reorganization.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the new section were accepted in writing and by fax. No comments were received concerning the new section.

The Board approved the final order adopting the new section on November 13, 2012.

The new section is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205938
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 5, 2012
Proposal publication date: September 21, 2012
For further information, please call: (512) 475-3916

♦ ♦ ♦

TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 21. HISTORY PROGRAMS

The Texas Historical Commission ("the commission") adopts amendments to §§21.7, 21.9, and 21.15, relating to the Official Texas Historical Marker Program and the Museum Services Program. The amendments are adopted without changes to the proposed text as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6870). The text of the sections will not be republished.

The commission's Official Texas Historical Marker Program and the Museum Services Program are the agency's responsibility under Texas Government Code §442.006. The Official Texas Historical Marker Program works with county historical commissions throughout the state to mark and interpret local and state history. The marker program underwent a significant program redesign in 2006 which formalized the role of the county historical commissions in the marker application process and outlined program priorities and guidelines. The Museum Services Program works with history museums across the state to promote best practices in the care and preservation of their collections.

The purpose of the Official Texas Historical Marker Program is to promote Texas' history and encourage heritage tourism by commemorating diverse subjects including events that changed the course of local or state history and individuals who made a lasting contribution to the state.

The purpose of the Museum Services Program is to assist history museums throughout the state on various aspects of museum operations, including the preservation, management, and interpretation of museum collections.

The adoption of the amendment to §21.7 updates the chapter and rule reference related to the Historic Texas Cemetery designation process. The amendment to §21.7 corrects a rule reference that resulted due to changes in the code that were effective May 2010. The correct rule reference is §22.6 and this change is reflected in the amendment.

The adoption of amendments to §21.9 clarifies the marker application evaluation procedures to reflect changes in the scoring criteria governing the evaluation for approval or rejection of applications for Official Texas Historical Markers, Recorded Texas Historic Landmarks (RTHLs), or Historic Texas Cemetery designations.

The adoption of the amendment to §21.15 strikes a reference to the operation of the Sam Rayburn House Museum as part of the agency's Museum Services Program. The Sam Rayburn House Museum now operates under the jurisdiction of the agency's Historic Sites Division.

No comments were received on the proposed amendments.

SUBCHAPTER B. OFFICIAL TEXAS HISTORICAL MARKER PROGRAM

13 TAC §21.7, §21.9

The amendments are adopted under §442.005(q) of Title 4, Subtitle D of the Texas Government Code, which provides the Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

The adopted amendments implement §442.006 of the Texas Government Code.

No other statutes, articles, or codes are affected by these amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205946
Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: December 5, 2012
Proposal publication date: August 31, 2012
For further information, please call: (512) 463-8817

♦ ♦ ♦

SUBCHAPTER D. MUSEUM SERVICES PROGRAM

13 TAC §21.15

The amendments are adopted under §442.005(a) and (q) of Title 4, Subtitle D of the Texas Government Code, which provide the Commission with the authority to provide services to museums and to promulgate rules to reasonably effect the purposes of this chapter.

No other statutes, articles, or codes are affected by these adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205947
Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: December 5, 2012
Proposal publication date: August 31, 2012
For further information, please call: (512) 463-8817

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments (committee) adopts amendments to §§141.2, 141.3, 141.10, 141.15 - 141.17, and 141.20; new §§141.14 and 141.26 - 141.29; and the repeal of §141.14, concerning the regulation and sale of hearing instruments by licensed hearing instrument dispensers, apprentice permit holders, and temporary training permit holders. The amendments to §§141.2, 141.3, and 141.15 and new §141.14 and §141.29 are adopted with changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4164). The amendments to §§141.10, 141.16, 141.17, and 141.20, new §§141.26 - 141.28, and the repeal of §141.14 are adopted without changes, and the sections will not be republished.

BACKGROUND AND PURPOSE

The rules meet the requirements and directives of Senate Bill 663, 82nd Texas Legislature, Regular Session, 2011, concerning the adoption of rules jointly with the State Board of Examiners for Speech-Language Pathology and Audiology regarding the sale of hearing instruments, and concerning the Sunset Review of the committee. Additionally, the rules meet the requirements and directives of Senate Bill 1733, 82nd Texas Legislature, Regular Session, 2011, concerning the adoption of rules relating to licensure of spouses of members of the military.

SECTION BY SECTION SUMMARY

The amendments to §§141.2, 141.3, 141.10, 141.15 - 141.17 and 141.20 address the changes required from the Sunset Review process of the committee regarding definitions, the committee, application by licensure holders from another state, continuing education requirements, examinations, conditions of sale, complaints, violations, and informal dispositions.

New §141.26 and §141.27 create requirements for obtaining fingerprints from applicants and license holders.

New §141.28 establishes the requirements for the licensing process for spouses of members of the military.

New §141.29 is a joint rule with the State Board of Examiners for Speech-Language Pathology and Audiology establishing the requirements for the sale of hearing instruments, including information required in the written contract for hearing instrument purchase, records that must be retained by licensed hearing in-

strument dispensers, apprentice permit holders, and temporary training permit holders, and guidelines for the 30-day trial period during which a person may cancel the purchase of a hearing instrument.

COMMENTS

The committee has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period. The commenters were a licensee and the Texas Hearing Aid Association. The commenters were not against the rules in their entirety; however, the commenters suggested some recommendations for change as discussed in the summary of comments.

Comment: Regarding §141.2(19) and (20), one commenter supported the rules and recommended that they be adopted. One commenter recommended the deletion of the "Manufacturer" and "Non-Manufacturer" definitions as inaccurate, unnecessary, overly broad, and/or misleading.

Response: The committee disagrees that the definitions should be deleted. The intent of the definitions is valid and sufficiently addresses the terms. The committee notes that the terms are adopted at the direction of the Texas Legislature, in the amended statutory language to Occupations Code, Chapter 402, in 2011, requiring the committee to adopt rules to clearly define what constitutes a manufacturer or non-manufacturer continuing education sponsor. No change was made as a result of the comment.

Comment: Regarding §141.2(21), one commenter recommended modification to the rule to include the term "e-learning."

Response: The committee disagrees that modification is required, as the rule sufficiently defines "online continuing education course." No change was made as a result of the comment.

Comment: Regarding §141.2(22), one commenter recommended modification to the rule to require that owners and chief operating officers must register their ownership of a dispensing practice with the committee and subsequently register any change of ownership.

Response: The committee disagrees. This recommendation represents a substantive change to the rule proposal and the committee has no authority to impose it without first going through standard rulemaking procedures. No change was made as a result of the comment.

Comment: Regarding §141.2(24), one commenter recommended limiting the terms "manufacturers" and "distributors" to those individuals and firms that are registered with the U.S. Food and Drug Administration.

Response: The committee disagrees. This recommendation represents a substantive change to the rule proposal and the committee has no authority to impose it without first going through standard rulemaking procedures. No change was made as a result of the comment.

Comment: Regarding §141.2(25), one commenter recommended revision to the definition "Selling of hearing instrument by mail" to prohibit the aiding and abetting of improper fitting and dispensing hearing instruments by mail.

Response: The committee disagrees. This recommendation represents a substantive change to the rule proposal and the committee has no authority to impose it without first going through standard rulemaking procedures. No change was made as a result of the comment.

Comment: Regarding §141.14(d), one commenter recommended addressing one specific online continuing education provider by name.

Response: The committee disagrees. It is unnecessary to mention a provider by name to accomplish the intent of the rule. No change was made as a result of the comment.

Comment: Regarding §141.14(e), one commenter observed that the rule lacks clarity in that it does not specify whether it refers to earning the hours annually or biennially. The commenter recommended deleting the rule.

Response: The committee disagrees with the recommended deletion, as the intent is valid and it is important to clarify the limitation on manufacturer continuing education hours. The committee agrees with the commenter, however, that the rule lacks clarity and has adopted the phrase "per renewal period" to improve understanding of the rule.

Comment: Regarding §141.14(f), one commenter recommended inserting the word "writer" into the first sentence of the rule.

Response: The committee disagrees. The sentence already contains the phrase "written by the licensee" and further clarification is not needed. No change was made as a result of the comment.

Comment: Regarding §141.14(k) and (n), one commenter recommended that the continuing education sponsor fee is unreasonable and that it should be decreased from $500 to $50.

Response: The committee disagrees. The committee has not received complaints from continuing education providers that the fee is unreasonable. The committee does not believe the fee should be decreased and it may monitor this issue in the future. No change was made as a result of the comment.

Comment: Regarding §141.14(o), one commenter recommended that the subsection be deleted, which would require all currently approved continuing education sponsors to comply with the amended rules relating to the definition of manufacturer.

Response: The committee disagrees. It is necessary to put such a rule in place, as it serves to allow previously approved providers to continue to hold the designation that has already been given to them. A new provider or a provider that fails to renew approval in the future will be required to comply with the designations in effect at the time of application. No change was made as a result of the comment.

Comment: Regarding §141.14(s), one commenter recommended that the subsection be deleted and stated that a license holder can be his or her own online continuing education sponsor.

Response: The committee disagrees. The submission of courses for approval is an important oversight component for approved continuing education sponsors. No change was made as a result of the comment.

Comment: Regarding §141.15(e)(1), one commenter recommended adding the phrase "under the Act" to clarify that only persons licensed under Occupations Code, Chapter 402, may serve as examination proctors.

Response: The committee agrees and has added the recommended phrase.

Additionally, comments were received from staff and committee members and resulted in revisions to the rule text.

Concerning §141.2(31), the rule reference "§141.29(c) of this title (relating to Joint Rule Regarding the Sale of Hearing Instruments)" replaced "§141.16 of this title (relating to Condition of Sale)."

Concerning §141.3(e)(1) and (2), the term "vice-president" is changed to "assistant presiding officer." The amendment to subsection (f)(2) of this section changes the term "president" to "presiding officer."

The committee made the following editorial revisions for improving consistency within the sections and with Occupations Code, Chapter 402.

Regarding §141.29, staff and committee members commented that the rule has minor inconsistencies with the joint rule adopted by the State Board of Examiners for Speech-Language Pathology and Audiology. In order to meet the legislative directive for joint rulemaking on this topic, the rules must be consistent. Section 141.29(b)(1) was corrected to create two sentences and to insert the word "shall" in the second sentence.

Section 141.29(b)(3) was modified to clarify that the 30 consecutive day trial period begins anew only if the repair or remake requires the hearing instrument to be returned to the manufacturer.

Section 141.29(c)(8) was modified to clarify that the contract must address complaints against licensed fitters and dispensers of hearing instruments, not licensed audiologists.

Section 141.29(d) was amended to replace the word "board" with "committee."

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

22 TAC §§141.2, 141.3, 141.10, 141.14 - 141.17, 141.20, 141.26 - 141.29

STATUTORY AUTHORITY

The amendments and new rules are authorized under Occupations Code, §402.102, which provides the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments with the authority to adopt rules necessary to administer and enforce Occupations Code, Chapter 402.

§141.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Texas Occupations Code, Chapter 402, concerning the licensing of persons authorized to fit and dispense hearing instruments.

(2) Administrative Law Judge--A judge employed by the State Office of Administrative Hearings.

(3) APA--Administrative Procedure Act, the Government Code, Chapter 2001.

(4) Applicant--A person who applies for a license or permit under the Act.

(5) Apprentice permit--A permit issued by the committee to a person who meets the requirements of Texas Occupations Code, §402.207.

(6) Certification, proof of--A certificate of calibration, compliance, conformance, or performance.

(7) Committee--The State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments.

(8) Contact hour--A period of time equal to 55 minutes.

(9) Contract--See definition for "written contract for services."

(10) Contested case--A proceeding in accordance with Administrative Procedure Act (APA) in this chapter, including but not restricted to rule enforcement and licensing, in which the legal rights, duties, or privileges of a party are to be determined by the committee after an opportunity for an adjudicative hearing.

(11) Continuing education--Education intended to maintain and improve the quality of professional services in the fitting and dispensing of hearing instruments, to keep licensees knowledgeable of current research, techniques, and practices, and provide other resources which will improve skills and competence in the fitting and dispensing of hearing instruments.

(12) Department--Department of State Health Services.

(13) Direct supervision--The physical presence with prompt evaluation, review and consultation of a supervisor anytime a temporary training permit holder is engaged in the act of fitting and dispensing of hearing instruments.

(14) Fitting and dispensing hearing instruments--The measurement of human hearing by the use of an audiometer, or by any means, for the purpose of making selections, adaptations, or sales of hearing instruments. The term includes the making of impressions for earmolds to be used as a part of the hearing instrument and any necessary post-fitting counseling for the purpose of fitting and dispensing hearing instruments.

(15) Formal hearing--A hearing or proceeding in accordance with this chapter, including a "contested case" as defined in this section.

(16) Indirect supervision--The daily evaluation, review, and prompt consultation of a supervisor anytime a permit holder is engaged in the act of fitting and dispensing hearing instruments.

(17) License--A license or permit issued by the committee under Texas Occupations Code, Chapter 402, and this chapter to a person authorized to fit and dispense hearing instruments.

(18) Licensee--Any person licensed or permitted by the committee.

(19) Manufacturer--The term includes a person who applies to be a continuing education sponsor who is employed by, compensated by, or represents an entity, business, or corporation engaged in any of the activities described in this paragraph. An entity, business, or corporation that:

(A) is engaged in the manufacturing or production of hearing instruments for wholesale to a licensee or other hearing provider;

(B) is engaged in the manufacturing or production of hearing instruments for sale to the public;

(C) is engaged in assembling hearing instruments for wholesale to a licensee or other hearing provider;

(D) is engaged in assembling hearing instruments for sale to the public;

(E) is a subsidiary of, or held by, an entity that is engaged in manufacturing, producing, or assembling hearing instruments as described above;

(F) holds an entity, business, or corporation engaged in manufacturing, producing, or assembling hearing instruments as described above; or

(G) serves as a buying group for an entity, business, or corporation engaged in manufacturing, producing, or assembling hearing instruments as described above.

(20) Non-Manufacturer--Any person, entity, buyer group, or corporation that does not meet the definition of a manufacturer.

(21) Online continuing education course--A continuing education course conducted through the Internet.

(22) Ownership of dispensing practice--A person who owns, maintains, or operates an office or place of business where the person employs or engages under contract a person who practices the fitting and dispensing of hearing instruments shall be considered also to be engaged in the practice of fitting and dispensing of hearing instruments under this Act.

(23) Person--An individual, corporation, partnership, or other legal entity.

(24) Sell or sale--A transfer of title or the right to use by lease, bailment, or any other contract. For the purpose of Texas Occupations Code, §402.001(7), the term "sell" or "sale" shall not include sales at wholesale by manufacturers to persons licensed under this Act, or to the distributors for distribution and sale to persons licensed under Texas Occupations Code, §402.001(7), and this chapter.

(25) Selling of hearing instrument by mail--Anytime a hearing instrument is not sold, fitted or dispensed in person by a licensee or permit holder.

(26) Specific Product--Specific product shall include, but not be limited to, brand name, model number, shell type, and circuit type.

(27) Sponsor--Provider of a continuing education activity.

(28) Supervisor--A supervisor is a person who holds a valid license to fit and dispense hearing instruments under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312, and meets the qualifications established by Texas Occupations Code, §402.255 and this chapter.

(29) Temporary training permit--A permit issued by the committee to persons authorized to fit and dispense hearing instruments only under the direct or indirect supervision as appropriate of a person who holds a valid license to fit and dispense hearing instruments under Texas Occupations Code, Chapter 401 or 402, other than an individual licensed under §401.311 or §401.312, and meets the qualifications established by Texas Occupations Code, §402.255 and this chapter.

(30) Working days--Working days are Monday through Friday, 8:00 a.m. to 5:00 p.m.

(31) Written contract for services--A written contract between the licensee and purchaser of a hearing instrument as set out in §141.29(c) of this title (relating to Joint Rule Regarding the Sale of Hearing Instruments).

(32) 30-day trial period--The period in which a person may cancel the purchase of a hearing instrument.

§141.3. The Committee.

(a) Meetings. Meetings shall be announced and conducted under the provisions of the Texas Open Meetings Act, the Government Code, Chapter 551.

(b) Transaction of official business.

(1) The committee may transact official business only when in a legally constituted meeting with a quorum present. Five members of the committee constitute quorum.

(2) The committee shall not be bound in any way by any statement or action on the part of any committee or staff member except when a statement or action is pursuant to specific instructions of the committee.

(3) Robert's Rules of Order Revised shall be the basis of parliamentary decisions except as otherwise provided in this chapter.

(c) Agendas.

(1) The executive director shall be responsible for preparing and submitting an agenda to each member of the board prior to each meeting which includes items requested by members, items required by law, and other matters of committee business which have been approved for discussion by the president.

(2) The official agenda of a meeting shall be filed with the Texas Secretary of State as required by law.

(d) Minutes.

(1) The minutes of a committee meeting are official only when affixed with the original signatures of the president and the executive director.

(2) Drafts of the minutes of each meeting shall be forwarded to each member of the committee for review and comments or corrections 14 days prior to approval by the committee.

(3) The official minutes of the committee meetings shall be kept in the office of the executive director and shall be available on the department's website.

(e) Elections.

(1) At the meeting held nearest to August 31 of each year, the committee shall elect an assistant presiding officer.

(2) A vacancy which occurs in the office of assistant presiding officer may be filled at any regular meeting as required.

(f) Officers.

(1) Presiding Officer.

(A) The governor shall designate a member of the committee as the presiding officer of the committee to serve in that capacity at the will of the governor.

(B) The presiding officer shall preside at all meetings at which he or she is in attendance and perform all duties prescribed by law or this chapter.

(C) The presiding officer is authorized by the committee to make day-to-day minor decisions regarding committee activities in order to facilitate the responsiveness and effectiveness of the committee.

(2) Assistant Presiding Officer. The assistant presiding officer shall perform the duties of the presiding officer in the absence or disability of the presiding officer.

(g) Subcommittees.

(1) The committee or the presiding officer may establish subcommittees deemed necessary to carry out committee responsibilities.

(2) The presiding officer shall appoint members of the committee to serve on subcommittees with at least one public member appointed to each subcommittee.

(3) Subcommittees shall make regular reports to the committee.

(4) Subcommittees may direct all reports or other materials to the executive director for distribution.

(5) Subcommittees shall meet when called by the subcommittee chairperson or when directed by the committee.

(6) The continuing education subcommittee shall consider matters relating to the continuing education of licensees and permit holders, including the approval of programs and sponsors, and shall make recommendations to the committee as appropriate.

(7) The examination subcommittee shall consider matters relating to the licensure examination, including administration and content, and shall make recommendations to the committee as appropriate.

(8) The applications subcommittee shall consider matters relating to license and permit applications referred by the Executive Director and shall make recommendations to the committee as appropriate.

(9) The complaints subcommittee shall consider matters relating to complaints filed against licensees and permit holders and may propose disciplinary action if a violation of the Act or the rules is substantiated. The subcommittee may also dismiss matters for no violation, for lack of substantiation of a violation, or for lack of jurisdiction. The subcommittee shall make recommendations to the committee as appropriate.

(h) Executive director. The executive director shall:

(1) keep the minutes of proceedings of the committee and shall be custodian of the files and records of the committee;

(2) coordinate activities with department staff engaged in the administration of the licensing program;

(3) participate with department staff in complaint intake and processing and the investigation and presentation of complaints;

(4) be responsible for all correspondence for the committee and obtain, assemble, or prepare reports and information that the committee may direct, or as authorized or required by the department or other agency with appropriate statutory authority;

(5) have the responsibility of assembling and evaluating materials submitted for approval as set out in §141.7 of this title (relating to Processing Procedures). Determinations made by the executive director that propose denial of licensure are subject to the approval of the applications subcommittee of the committee; and

(6) coordinate with department staff in the administration of licensure examinations.

(i) Reimbursement for expenses.

(1) A committee member is entitled to reimbursement of travel expenses as provided by the General Appropriations Act.

(2) Payment to committee members of travel expenses shall be on official state vouchers which have been approved by the department.

(j) Official records of the committee.

(1) Requests for committee records may be made under the Texas Public Information Act, Government Code, Chapter 552. Records which are public may be reviewed by inspection, duplication, or both, upon written request.

(2) Applicable cost of duplication shall be paid by the requestor. The charge for copies shall be the same as set by the department for copies.

(k) Impartiality. Any committee member who is unable to be impartial in the determination of an applicant's eligibility for licensure or in a disciplinary action against a licensee or permit holder shall so declare this to the committee and shall not participate in any committee proceedings involving that applicant, licensee, or permit holder.

(l) Nondiscrimination. The committee shall make no decision in the discharge of its statutory authority with regard to any person's race, religion, color, gender, national origin, age, disability, sexual orientation, or genetic information.

(m) Applicants with disabilities.

(1) The committee shall comply with the Americans with Disabilities Act.

(2) Applicants with disabilities shall inform the committee 30 days in advance of any special accommodations needed.

§141.14. Continuing Education Requirements.

(a) This section establishes the requirements and procedures for continuing education. These requirements are intended to maintain and improve the quality of their professional services in fitting and dispensing of hearing instruments that are provided to the public; to keep the licensee knowledgeable of current research, techniques and practices; and to provide other resources which will improve skill and competence in the fitting and dispensing of hearing instruments.

(b) A minimum of 20 contact hours of continuing education is required to be completed during each two-year renewal period. A two-year renewal period begins on the first day after the previous license expiration date and ends on the new license expiration date.

(c) A contact hour shall be 55 minutes of attendance in an approved continuing education course.

(d) No more than 10 contact hours per renewal period may be earned from an approved online continuing education course offered by an approved continuing education sponsor.

(e) No more than 5 contact hours per renewal period may be earned from an approved continuing education course offered by an approved manufacturer continuing education sponsor.

(f) On written request to the department, a licensee may take the state licensing examination. A licensee who pays the examination fee and passes the examination shall be exempt from the continuing education requirement for the renewal period in which the examination is taken.

(g) A licensee may be credited with continuing education hours for a published book or article written by the licensee that contributes to the licensee's professional competence. The continuing education subcommittee may grant credit hours based on the degree that the published book or article advanced knowledge regarding the fitting and dispensing of hearing instruments. No more than 5

contact hours per renewal period may be granted for preparation of a publication.

(h) The committee may renew the license of a licensee who has not complied with the continuing education requirements if the licensee:

(1) has served in the regular armed forces of the United States during any part of the 24 months before the end of the two-year renewal period;

(2) submits proof from an attending physician that the licensee suffered a serious disabling illness or physical disability that prevented compliance with the continuing education requirements during the 24 months before the end of the two-year renewal period; or

(3) was licensed for the first time during the 24 months before the end of the two-year renewal period.

(i) If selected for audit, a licensee shall provide written proof of compliance with this section, including written proof of attendance or completion of approved courses completed during the renewal period.

(j) Course categories. Continuing education shall be acceptable if the education is described in subsection (f) or (g) of this section or falls in one or more of the following categories:

(1) participation in approved continuing education courses offered by approved continuing education sponsors;

(2) completion of academic courses at an accredited college or university in areas directly supporting development of skills and competence in the fitting and dispensing of hearing instruments; and/or

(3) participation or teaching in programs directly related to the fitting and dispensing of hearing instruments (e.g., institutes, seminars, workshops, or conferences) which are approved or offered by an accredited college or university.

(k) In accordance with the Act, continuing education courses must be provided by a department-approved continuing education sponsor. An individual or organization may request approval as a continuing education sponsor by submitting an application to the department. The department may consult as needed with a committee member designated by the presiding officer regarding the approval of continuing education sponsors.

(l) After review of the continuing education sponsor application, the applicant may be approved by the department as either a manufacturer continuing education sponsor or a non-manufacturer continuing education sponsor.

(m) Upon approval, the continuing education sponsor applicant shall pay the continuing education sponsor fee as set out in §141.6 of this title (relating to Application Procedures). The approved sponsor status shall be effective for one year from the date of receipt of the sponsor fee.

(n) Continuing education sponsors are required to renew their approved sponsor status annually by completing and returning to the department the sponsor renewal form and the continuing education sponsor fee. If not renewed on or before the annual renewal date, the continuing education sponsor must reapply for approved sponsor status.

(o) The definitions of "manufacturer" and "non-manufacturer" found in §141.2 of this title (relating to Definitions) do not apply to a continuing education sponsor approved prior to September 1, 2011 and who was designated by the continuing education subcommittee as either a manufacturer or non-manufacturer sponsor. If a continuing education sponsor approved prior to September 1, 2011 does not renew the annual sponsor approval, that sponsor must comply with all requirements and procedures of this section upon reapplication for approved sponsor status.

(p) Each continuing education course offered by an approved sponsor must be submitted to the department on the required course approval form.

(q) The department shall approve all continuing education courses submitted by approved sponsors. The department may consult as needed with a committee member designated by the presiding officer regarding the approval of continuing education courses.

(r) Each continuing education course will be evaluated by the department on the basis of the following criteria:

(1) relevance of the subject matter to increase or support the development of skills and competence in the fitting and dispensing of hearing instruments or in studies or disciplines related to fitting and dispensing of hearing instruments;

(2) objectives of specific information and skills to be learned; and

(3) subject matter, educational methods, materials, qualifications of instructors and presenters, and facilities utilized, including the frequency and duration of sessions, and the adequacy to implement learner objectives.

(s) Approved sponsors who offer online continuing education must submit each course for approval. Course approval shall not be given for a website or domain name.

(t) Approved continuing education courses and sponsors will be listed on the department's website.

(u) An organization or individual who meets the required criteria and is approved by the department may advertise as an approved sponsor of continuing education for licensed fitters and dispensers of hearing instruments.

(v) Each continuing education sponsor shall provide each participant with a certificate of completion that documents the participant's name, the continuing education course number, the number of approved continuing education hours, the title and date(s) of the program as approved by the department, and the name of the approved continuing education sponsor.

(w) To receive credit for completion of academic work the licensee must submit an official transcript(s) from accredited school(s) showing completion of hours in appropriate areas for which the licensee received a passing grade.

(x) The committee will not give continuing education credit to any licensee for:

(1) education incidental to the regular professional activities of a licensee such as knowledge gained through experience or research;

(2) organization activity such as serving on committees or councils or as an officer in a professional organization; and

(3) any program which is not described in, or in compliance with, this section.

§141.15. Examination.

(a) Purpose. This section sets out provisions governing the administration, content, grading, and other procedures for examination in the fitting and dispensing of hearing instruments.

(b) Application for examination.

(1) The department shall notify the applicant whose application has been approved at least 45 days prior to the next scheduled examination. This notice shall include the examination registration form. Applications which are received incomplete or late may cause the applicant to miss the examination deadline.

(2) An examination registration form must be completed and returned to the committee office by the applicant with the required examination fee and any requests for special accommodations at least 30 days prior to the date of the examination.

(c) Examination.

(1) The examination shall consist of a written section and a practical section. The examination will consist of the following areas as they relate to the fitting and dispensing of hearing instruments:

(A) basic physics of sound;

(B) structure and function of hearing instruments;

(C) fitting of hearing instruments;

(D) pure tone audiometry, including air conduction testing and bone conduction testing;

(E) live voice and recorded voice speech audiometry;

(F) masking when indicated for air conduction, bone conduction, and speech;

(G) recording and evaluation of audiograms and speech audiometry to determine the candidacy for a hearing instrument;

(H) selection and adaption of hearing instruments, testing of hearing instruments, and verification of aided hearing instrument performance;

(I) taking of earmold impressions;

(J) verification of hearing instrument fitting and functional gain measurements using a calibrated system;

(K) anatomy and physiology of the ear;

(L) post-counseling and aural rehabilitation of an individual with a hearing impairment for the purpose of fitting and dispensing hearing instruments;

(M) use of an otoscope for the visual observation of the entire ear canal; and

(N) laws, rules, and regulations of this state and the United States.

(2) The examination may not test knowledge of the diagnosis or treatment of any disease or injury to the human body.

(d) Failure of examination.

(1) An applicant who fails an examination may retake the failed portion or portions of the examination after payment of an additional examination fee. An applicant must hold a current temporary training permit in order to be re-examined.

(2) If the applicant fails the examination, the applicant must repeat the hours of direct supervision required for the sections that were failed.

(3) If the applicant fails the examination, the department may require the applicant to submit evidence of satisfactory completion of additional courses of study prescribed by the committee.

(4) The applicant has 30 days after notification of failing the examination to request in writing that the committee furnish the applicant with an analysis of that person's performance on the examination.

(e) Qualifications for Examination Proctor.

(1) A proctor must be licensed in good standing as a hearing instrument fitter and dispenser under the Act.

(2) A proctor must have held the license for at least three years prior to the examination date.

(3) A proctor must have observed at least five full practical examination sessions prior to serving as a proctor.

(4) Disciplinary actions or other actions that may disqualify a licensee from serving as a proctor are:

(A) suspension or probated suspension;

(B) any action requiring supervision by another license holder; or

(C) an administrative penalty or reprimand within three years prior to the examination date.

§141.29. Joint Rule Regarding the Sale of Hearing Instruments.

(a) This section constitutes the rules required by the Act to be adopted jointly with the State Board of Examiners for Speech-Language Pathology and Audiology. The requirements of this section shall be repealed or amended only through consultation with, and mutual action by, the State Board of Examiners for Speech-Language Pathology and Audiology.

(b) Guidelines for a 30 consecutive day trial period.

(1) All clients shall be informed of a 30 consecutive day trial period by written contract for services. All charges associated with such trial period shall be included in this written contract for services, which shall include the name, address, and telephone number of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments.

(2) Any client purchasing one or more hearing instruments shall be entitled to a refund of the purchase price advanced by the client for the hearing instrument(s), less the agreed-upon amount associated with the trial period, upon return of the instrument(s), in good condition to the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder within the trial period ending 30 consecutive days from the date of delivery. Should the order be canceled by the client prior to the delivery of the hearing instrument(s), the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder may retain the agreed-upon charges and fees as specified in the written contract for services. The client shall receive the refund due no later than the 30th day after the date on which the client cancels the order or returns the hearing instrument(s), in good condition, to the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder.

(3) Should the hearing instrument(s) have to be returned to the manufacturer for repair or remake during the trial period, the 30 consecutive day trial period begins anew. The trial period begins on the day the client reclaims the repaired/remade hearing instrument(s). The expiration date of the new 30 consecutive day trial period shall be made available to the client in writing, through an amendment to the original written contract. The amendment shall be signed by both the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder and the client.

(4) On delivery of a new replacement hearing instrument(s) during the trial period, the serial number of the new instrument(s), the delivery date of the hearing instrument(s), and the date of the expiration of the 30 consecutive trial period must be stated in writing.

(5) If the date of the expiration of the 30 consecutive day trial period falls on a holiday, weekend, or a day the business is not open, the expiration date shall be the first day the business reopens.

(c) Upon the sale of any hearing instrument(s) or change of model or serial number of the hearing instrument(s), the owner shall ensure that each client receives a written contract that contains:

(1) the date of sale;

(2) the make, model, and serial number of the hearing instrument(s);

(3) the name, address, and telephone number of the principal place of business of the license or permit holder who dispensed the hearing instrument;

(4) a statement that the hearing instrument is new, used, or reconditioned;

(5) the length of time and other terms of the guarantee and by whom the hearing instrument is guaranteed;

(6) a copy of the written forms (relating to waiver forms);

(7) a statement on or attached to the written contract for services, in no smaller than 10-point bold type, as follows: "The client has been advised that any examination or representation made by a licensed hearing instrument dispenser or apprentice permit holder or temporary training permit holder in connection with the fitting and selling of the hearing instrument(s) is not an examination, diagnosis or prescription by a person duly licensed and qualified as a physician or surgeon authorized to practice medicine in the State of Texas and, therefore, must not be regarded as medical opinion or advice;"

(8) a statement on the face of the written contract for services, in no smaller than 10-point bold type, as follows: "If you have a complaint against a licensed hearing instrument dispenser or apprentice permit holder or temporary training permit holder, you may contact the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments, P.O. Box 149347, Austin, Texas 78714-9347, telephone 1-800-942-5540;"

(9) the printed name, license type, signature and license or permit number of the licensed hearing instrument dispenser, apprentice permit holder, or temporary training permit holder who dispensed the hearing instrument;

(10) the supervisor's name, license type, and license number, if applicable;

(11) a recommendation for a follow-up appointment within 30 days after the hearing instrument fitting;

(12) the expiration date of the 30 consecutive day trial period under subsection (b) of this section; and

(13) the dollar amount charged for the hearing instrument and the dollar amount charged for the return or restocking fee, if applicable.

(d) Record keeping. The owner of the dispensing practice shall ensure that records are maintained on every client who receives services in connection with the fitting and dispensing of hearing instruments. Such records shall be preserved for at least five years after the date of the last visit. All of the business's records and contracts are solely the property of the person who owns the business. Client access to records is governed by the Health Insurance Portability and Accountability Act (HIPAA). The records must be available for the committee's inspection and shall include, but not be limited to, the following:

(1) pertinent case history;

(2) source of referral and appropriate documents;

(3) medical evaluation or waiver of evaluation;

(4) copies of written contracts for services and receipts executed in connection with the fitting and dispensing of each hearing instrument provided;

(5) a complete record of hearing tests, and services provided; and

(6) all correspondence specifically related to services provided to the client or the hearing instrument(s) fitted and dispensed to the client.

(e) The written contract and trial period information provided to a client in accordance with this section, orally and in writing, shall be in plain language designed to be easily understood by the average consumer.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205904
James Leffingwell
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Effective date: December 4, 2012
Proposal publication date: June 8, 2012
For further information, please call: (512) 776-6972

22 TAC §141.14

STATUTORY AUTHORITY

The repeal is authorized under Occupations Code, §402.102, which provides the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments with the authority to adopt rules necessary to administer and enforce Occupations Code, Chapter 402.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205905
James Leffingwell
Chair
State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments
Effective date: December 4, 2012
Proposal publication date: June 8, 2012
For further information, please call: (512) 776-6972

♦ ♦ ♦

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.17

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §153.17, concerning Renewal or Extension of Certification and License or Renewal of Trainee Approval. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7033).

The amendments were proposed at TALCB's August 17, 2012, meeting to implement the statutory change made to Texas Occupations Code, §1103.2111 by House Bill 2375 (effective May 27, 2011) changing the period for late renewal from one year to six months.

The reasoned justification for the amendment to §153.17 is conformity with statutory provisions.

No comments were received on the amendments as proposed.

The amendments are adopted under Texas Occupations Code, §1103.151, which authorizes the TALCB to adopt rules necessary for certifying or licensing an appraiser and §1103.2111 concerning late renewals.

The statute affected by the amendments are Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205911
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

22 TAC §153.20

The Texas Appraiser Licensing and Certification Board (TALCB) adopts an amendment to §153.20, concerning Guidelines for Revocation, Suspension, Denial of Licensure or Certification; Probationary Licensure. The amendment is adopted with changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7034). In §153.20(a)(25) the Board added the phrase "after conducting reasonable due diligence, knowingly" to the beginning of the paragraph. This clarification language, inserting a safe harbor standard, was added after the proposed amendment was published to address concerns raised by commenters.

The amendment was proposed at TALCB's August 17, 2012, meeting to make it clear that the board considers acceptance by an appraiser of an assignment from an appraisal management company (AMC) that is not registered with the board to be an activity that can subject the appraiser to sanctions.

The reasoned justification for the amendment to §153.20 is greater consumer protection and transparency by clarifying that there could be sanctions against an appraiser who accepts an assignment from an unlicensed AMC that the appraiser reasonably knows or should have known is required to be registered to make appraisal assignments in Texas. This obligation impliedly exists currently and sanctions could be taken currently against an appraiser who knowingly accepts an assignment from an unlicensed or non-exempt AMC under §153.20(a)(21). This amendment is adopted to make it very clear to appraisers and AMCs that an appraiser who willingly assists an unlicensed AMC in circumventing the regulatory structure for consumer protection established by the Texas Legislature and TALCB will be subject to sanctions.

The revision to §153.20(a)(25) as adopted does not change the nature or scope so much that it could be deemed a different rule. The rule as adopted does not affect individuals other than those contemplated by the rule as proposed. The rule as adopted does not impose more onerous requirements than the proposed rule.

Four comments were received by TALCB on the proposed amendment. Three commenters spoke at the meeting. One felt that the amendment could create an additional burden on appraisers to keep records of verification of AMC status in the work file and also that the section refers to suspension or revocation of a license, which she felt was too harsh. She acknowledged it is a tough issue but didn't want the burden to be on the appraiser. The second questioned how to determine which clients were an AMC, so he would know who to ask for verification and was directed to the definition of an AMC in the rules. A commenter from an appraisal industry association member commented that he thought the process of verifying whether an AMC is registered is a fairly simple process and a good business practice if for no other reason that it increases the likelihood of getting paid. Another commenter submitted written comments against the amendment stating that it places the responsibility for monitoring and policing AMCs on the appraisers and it will be hard for appraisers to keep up with which AMCs are registered or exempt. However, the commenter goes on to say that it is reasonable to ask an appraiser to verify that an AMC is registered in the state when accepting an assignment and should notify TALCB when they discover unlicensed AMC activity.

TALCB does not agree that this amendment shifts the enforcement burden from TALCB to appraisers or that it will be hard for appraisers to keep up with which AMCs are registered in Texas. The burden for enforcement action against AMCs is and will continue to rest with TALCB. TALCB will also have the burden to prove that the appraiser did not use reasonable due diligence before accepting the assignment if any action is brought under this amendment. TALCB does whole-heartedly agree that it is reasonable to ask an appraiser to verify that an AMC is registered in this state or exempt before accepting an assignment. In fact, that is the purpose of the amendment, to clarify that such reasonable due diligence by the appraiser should take place prior to accepting an assignment. TALCB maintains an up-to-date list

of all registered AMCs on its website. If an appraiser receives an assignment from an AMC, it takes very little time to go to the website and check the list. If the AMC is on the list, the appraiser needs to be on that AMC's panel prior to accepting the assignment. The appraiser will know if the appraiser is on the panel because the appraiser will have received an invitation to join the panel via email and can accept by a click of the mouse. If the AMC is not on the list of registered AMCs, the appraiser should ask for written confirmation from the AMC that they are not required by law to be registered before accepting the assignment. If the appraiser receives such a letter or email, the appraiser will not be sanctioned under this amendment because reasonable due diligence was performed.

It should also be noted that the amendment does not require the appraiser to turn in a complaint on an AMC that is not licensed or exempt from licensure as one commenter suggested would be reasonable, although such reporting of unlicensed activity would be appreciated and helpful to TALCB. This amendment addresses only actions that are in the control of the appraiser--performing reasonable due diligence before accepting an assignment from an AMC and not accepting an assignment from an AMC that they know is unlicensed and not exempt.

The amendment is adopted under Texas Occupations Code, §1103.151, which authorizes the TALCB to adopt rules necessary for certifying or licensing an appraiser.

The statute affected by the amendment is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the amendment.

§153.20. Guidelines for Revocation, Suspension, Denial of Licensure or Certification; Probationary Licensure.

(a) The board may suspend or revoke a license, certification, authorization or registration issued under provisions of this Act or deny issuing a license, certification, authorization or registration to an applicant at any time when it has been determined that the person applying for or holding the license, certification, authorization, or registration:

(1) disregards or violates a provision of the Act or of the rules of the Texas Appraiser Licensing and Certification Board;

(2) is convicted of a felony;

(3) fails to notify the board not later than the 30th day after the date of the final conviction if the person, in a court of this or another state or in a federal court, has been convicted of or entered a plea of guilty or nolo contendere to a felony or a criminal offense involving fraud or moral turpitude;

(4) fails to notify the board not later than the 30th day after the date of incarceration if the person, in this or another state, has been incarcerated for a criminal offense involving fraud or moral turpitude;

(5) fails to notify the board not later than the 30th day after the date disciplinary action becomes final against the person with regard to any occupational license the person holds in Texas or any other jurisdiction;

(6) fails to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) in effect at the time of the appraisal or appraisal practice;

(7) acts or holds himself or herself or any other person out as a licensed or certified real estate appraiser under the Act when not so licensed or certified;

(8) accepts payment for appraiser services but fails to deliver the agreed service in the agreed upon manner;

(9) refuses to refund payment received for appraiser services when he or she has failed to deliver the appraiser service in the agreed upon manner;

(10) accepts payment for services contingent upon a minimum, maximum, or pre-agreed value estimate except when such action would not interfere with the appraiser's obligation to provide an independent and impartial opinion of value and full disclosure of the contingency is made;

(11) offers to perform appraiser services or agrees to perform such services when employment to perform such services is contingent upon a minimum, maximum, or pre-agreed value estimate except when such action would not interfere with the appraiser's obligation to provide an independent and impartial opinion of value and full disclosure of the contingency is made;

(12) makes a material misrepresentation or omission of material fact;

(13) has had a license or certification as an appraiser revoked, suspended, or otherwise acted against by any other jurisdiction for an act which is an offense under Texas law;

(14) procures a license, certification, authorization, approval, or registration pursuant to the Act by making false, misleading, or fraudulent representation;

(15) fails to actively, personally, and diligently supervise an appraiser trainee under his or her sponsorship or any person not licensed or certified under the Act who assists the licensee or certificate holder in performing real estate appraiser services;

(16) has had a final civil judgment entered against him or her on any one of the following grounds:

(A) fraud;

(B) intentional or knowing misrepresentation;

(C) grossly negligent misrepresentation in the making of real estate appraiser services;

(17) fails to make good on a payment issued to the board within thirty days after the board has mailed a request for payment by certified mail to the licensee's last known business address as reflected by the board's records;

(18) knowingly or willfully engages in false or misleading conduct or advertising with respect to client solicitation;

(19) acts or holds himself or any other person out as a licensed or certified real estate appraiser under this or another state's Act when not so licensed or certified;

(20) misuses or misrepresents the type of classification or category of licensure, certification, approval, or registration, or the license, certification, approval, or registration number;

(21) engages in any other act relating to the business or appraising that the board, in its discretion, believes warrants a suspension or revocation;

(22) uses any title, designation, initial or other insignia or identification that would mislead the public as to that person's credentials, qualifications, competency, or ability to perform certified or licensed appraisal services;

(23) fails to comply with a final order of the board;

(24) fails to answer all inquiries concerning matters under the jurisdiction of the board within 20 days of notice to said individual's

address of record, or within the time period allowed if granted a written extension by the board; or

(25) after conducting reasonable due diligence, knowingly accepts an assignment from an appraisal management company that is not exempt from registration under the Act which:

(A) has not registered with the board; or

(B) is registered with the board but has not placed the appraiser on its panel of appraisers maintained with the board.

(b) The board has discretion in determining the appropriate penalty for any violation under subsection (a) of this section.

(c) The board may probate a penalty or sanction, and may impose conditions of the probation, including, but not limited to:

(1) the type and scope of appraisals or appraisal practice;

(2) the number of appraiser trainees or authority to sponsor appraiser trainees;

(3) requirements for additional education;

(4) monetary administrative penalties; and

(5) requirements for reporting real property appraisal activity to the board.

(d) A person applying for reinstatement after revocation or surrender of a license or certification must comply with all requirements that would apply if the license or certification had instead expired.

(e) The provisions of this section do not relieve a person from civil liability or from criminal prosecution under the Act or under the laws of this State.

(f) The board may not investigate under this section a complaint submitted either more than two years after the date of discovery or more than two years after the completion of any litigation involving the incident, whichever event occurs later, involving the state licensed real estate appraiser, provisional licensed appraiser, state certified real estate appraiser, or appraiser trainee who is the subject of the complaint.

(g) Except as provided by Texas Government Code §402.031(b) and Texas Penal Code §32.32(d), there shall be no undercover or covert investigations conducted by authority of the Act.

(h) All board members, officers, directors, and employees of this agency shall be held harmless with respect to any disclosures made to the board in connection with any complaints filed with the board.

(i) A license, certification, authorization or registration may be revoked or suspended by the Attorney General or other court of competent jurisdiction for failure to pay child support under provisions of Chapter 232 of the Texas Family Code.

(j) A certified or licensed appraiser who files a complaint against another certified or licensed appraiser that the board determines to be frivolous is liable for a civil penalty. At the request of the board, the attorney general or a district or county attorney may institute a civil action in district court to collect a penalty under this subsection. A civil penalty under this subsection may not be less than $500 or more than $10,000. A civil penalty recovered in a suit instituted under this subsection shall be deposited in the state treasury to the credit of the general revenue fund.

(k) If the board determines that issuance of a probationary license is appropriate, the order entered by the board with regard to the application must set forth the terms and conditions for the probationary license. Terms and conditions for a probationary license may include any of the following:

(1) that the probationary licensee comply with the Act and with the rules of the Texas Appraiser Licensing and Certification Board;

(2) that the probationary licensee fully cooperate with the enforcement division of the Texas Appraiser Licensing and Certification Board in the investigation of any complaint filed against the licensee or any other complaint in which the licensee may have relevant information;

(3) that the probationary licensee attend a prescribed number of classroom hours in specific areas of study during the probationary period;

(4) that the probationary licensee limit appraisal practice as prescribed in the order;

(5) that the probationary licensee work under the direct supervision of a certified appraiser who will review and sign each appraisal report completed;

(6) that the probationary licensee report regularly to the board on any matter which is the basis of the probationary license; or

(7) that the probationary licensee comply with any other terms and conditions contained in the order which have been found to be reasonable and appropriate by the board after due consideration of the circumstances involved in the particular application.

(l) Unless the order granting a probationary license specifies otherwise, a probationary licensee may renew the license after the probationary period by filing a renewal application, satisfying applicable renewal requirements, and paying the prescribed renewal fee.

(m) If a license expires prior to the completion of a probationary term and the licensee files a late renewal application, any remaining probationary period shall be reinstated effective as of the day following the renewal of the previous license.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205912
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

22 TAC §153.23

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §153.23, concerning Inactive Status. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7034).

The amendments were proposed at TALCB's August 17, 2012, meeting to conform to and reconcile any discrepancies in Texas Occupations Code §1103.2111 and §1103.213. Section 1103.2111 was amended effective May 27, 2011 to decrease the period of time an appraiser could renew late from one year to six months. Section 1103.213 allows the election of inactive

status following expiration for a one year period and was not amended (through oversight or otherwise) and is now in conflict with §1103.2111. The amendments reasonably implement both provisions and eliminate the discrepancy when renewing late following expiration on an active or inactive basis. It also corrects a previous mistake in the rule.

The reasoned justification for the amendments to §153.23 is conformity with the Texas Appraiser Licensing and Certification Act (Act) and to eliminate discrepancy between the application of two related provisions of the Act.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Occupations Code, §1103.151, which authorizes the TALCB to adopt rules necessary for certifying or licensing an appraiser and Texas Occupations Code, §1103.213 and §1103.2111.

The statute affected by the amendments is Texas Occupations Code, Chapter 1103. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205913
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

CHAPTER 157. RULES RELATING TO PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §157.8

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §157.8, concerning Adverse Action Against a Licensee. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7035).

The amendments were proposed at TALCB's August 17, 2012, meeting to clarify that the rule also applies to appraisal management companies that are registered with the board and to set out the board's standards of practice and procedure when a licensee or registrant who has entered into an Agreed Order with the board wishes to request a modification of that order.

The reasoned justification for the amendments to §157.8 is greater clarity of procedural standards when an appraiser or appraisal management company wishes to modify an existing Agreed Order.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Chapter 1104.

The statutes affected by the amendments are Texas Occupations Code, Chapters 1103 and 1104. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205916
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

SUBCHAPTER B. CONTESTED CASE HEARINGS

22 TAC §157.12

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §157.12, concerning Failure to Attend Hearing; Default Judgment. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7036).

The amendments were proposed at TALCB's August 17, 2012, meeting to clarify the board's standards of practice and procedure when a respondent who has received proper notice of a contested case hearing does not appear at the hearing in accordance with the State Office of Administrative Hearings' rules 1 TAC §155.501 and §155.503 (relating to Default Proceedings and Dismissal Proceedings).

The reasoned justification for the amendments to §157.12 is clarification of procedural standards when a respondent fails to appear at a contested hearing.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Chapter 1104.

The statutes affected by the amendments are Texas Occupations Code, Chapters 1103 and 1104. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205917

Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

SUBCHAPTER C. POST HEARING

22 TAC §157.17

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §157.17, concerning Final Decisions and Orders. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7036).

The amendments were proposed at TALCB's August 17, 2012, meeting to clarify that while the board welcomes SOAH judges' recommendations regarding sanctions, the board has the authority and responsibility to impose disciplinary sanctions against appraisers, appraiser trainees and appraisal management companies. The amendments also delineate the procedures for remand and oral arguments; the standards required when the board may change a finding of fact, conclusion of law or recommendation in a proposal for decision; and the requirements for final orders.

The reasoned justification for the amendments to §157.17 is transparency and clarification of procedural standards when a contested case comes before the board for a final decision.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Chapter 1104 regarding appraisal management companies and the corresponding statutory sections for those chapters regarding action after hearing and decisions by the board, §§1103.518, 1103.521, 1104.214 and 1104.215.

The statutes affected by the amendments are Texas Occupations Code, Chapters 1103 and 1104. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205918
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

22 TAC §157.18

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §157.18, concerning Motions for Rehearing; Finality of Decisions. The amendments are adopted without changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7038).

The amendments were proposed at TALCB's August 17, 2012, meeting to clarify the board's practice and procedures regarding motions for rehearing by describing the requirements for filing a motion for rehearing; setting out the procedure for a hearing on the motion for rehearing; and addressing situations in which new evidence may be presented.

The reasoned justification for the amendments to §157.18 is greater clarity and transparency in procedures for motions for rehearing.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Chapter 1104 regarding appraisal management companies and the corresponding statutory sections for those chapters regarding rehearing, §§1103.519, 1103.520, 1104.216 and 1104.217.

The statutes affected by these amendments are Texas Occupations Code, Chapters 1103 and 1104. No other statute, code or article is affected by the amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205919
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

SUBCHAPTER D. PENALTIES AND OTHER ENFORCEMENT PROVISIONS

22 TAC §157.25

The Texas Appraiser Licensing and Certification Board (TALCB) adopts new §157.25, concerning Temporary Suspension. The new rule is adopted with changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7039). The difference between the rule as adopted and as proposed is defining "disciplinary panel" as "Panel"; removing the qualifier "annual" from the appointment process; adding language to provide three-day notice and opportunity for a hearing to respondents in appropriate circumstances as determined by the chair of the disciplinary panel; setting out that hearing process; and providing for a rehearing process in limited circumstances.

The new rule was proposed at TALCB's August 17, 2012 meeting to clarify the board's standards of practice and procedure for

temporary suspensions authorized by Texas Occupations Code, §1103.5511 and §1104.211.

The reasoned justification for new §157.25 is the establishment of procedural standards and greater transparency for temporary suspension proceedings.

Oral comments were received from a defense attorney regarding what happens if new information is discovered which could have affected the disciplinary panel's decision and that there may be some circumstances where a respondent should be given notice and opportunity of a hearing. The Enforcement Committee considered these issues and changes were made to the proposed text as set out above. The changes made to the text of the rule do not require republication since they do not change the rule so much that it can be deemed a different rule, do not affect individuals who would not have been impacted by the rule as proposed and do not impose more stringent requirements for compliance than the proposed version. In fact, both provisions give respondents more rights than under the proposed version.

The new rule is adopted under Texas Occupations Code, §1103.151 and §1104.051, which authorize the TALCB to adopt rules necessary for certifying or licensing an appraiser and administering the provisions of Texas Occupations Code, Chapter 1104; and Texas Occupations Code, §1103.5511 and §1104.211, the corresponding statutory sections of these chapters regarding temporary suspensions.

The statutes affected by the new rule are Texas Occupations Code, Chapter 1103 and 1104. No other statute, code or article is affected by the new rule.

§157.25. Temporary Suspension.

(a) The purpose of a temporary suspension proceeding is to determine whether the continued practice by a person licensed, certified or registered by the board would constitute a continuing threat to the public welfare. It is ancillary to a disciplinary proceeding regarding alleged violations of the Act or board rules and is not dispositive concerning any such violations.

(b) The three board members of the Enforcement Committee appointed by the chair of the board shall serve as the disciplinary panel ("Panel") under Texas Occupations Code, §1103.5511 and §1104.211. The chair of the board shall also appoint a board member to act as an alternate member of the Panel in the event a member of the Panel is recused or unable to attend a temporary suspension proceeding.

(c) Board staff must request a temporary suspension proceeding in writing by filing a motion for temporary suspension with the board's general counsel.

(d) The Panel may make a determination regarding a temporary suspension without notice or hearing pursuant to Texas Occupations Code, §1103.5511(c)(1) or §1104.211(c)(1), or may, if appropriate in the judgment of the chair of the Panel, provide the licensee or registrant with three days' notice of a temporary suspension hearing.

(e) The requirement under Texas Occupations Code, §1103.5511(c)(1) or §1104.211(c)(1) that "institution of proceedings for a contested case hearing is initiated simultaneously with the temporary suspension" shall be satisfied if, on the same day the motion for temporary suspension is filed with the board's general counsel, the licensed, certified or registered person that is the subject of the temporary suspension motion, and the State Office of Administrative Hearings, as applicable, is sent one of the following documents that alleges facts that precipitated the need for a temporary suspension:

(1) Notice of Alleged Violation;

(2) Original Statement of Charges; or

(3) Amended Statement of Charges.

(f) The Panel shall post notice of the temporary suspension proceeding pursuant to §551.045 of the Texas Government Code and Texas Occupations Code, §1103.5511(e) or §1104.211(e) and hold the temporary suspension proceeding as soon as possible.

(g) The determination whether the continued practice by a person licensed, certified or registered by the board would constitute a continuing threat to the public welfare shall be determined from information presented to the Panel. The Panel may receive information and testimony in oral or written form. Documentary evidence must be submitted to the board's general counsel in electronic format at least 24 hours in advance of the time posted for the temporary suspension hearing in all cases where the Panel will be meeting via teleconference. If a hearing is held following notice to a licensee or registrant, board staff will have the burden of proof and shall open and close. The party responding to the motion for temporary suspension may offer rebuttal arguments. Parties may request an opportunity for additional rebuttal subject to the discretion of the chair of the Panel. The chair of the Panel may set reasonable time limits for any oral arguments and evidence to be presented by the parties. The Panel may question witnesses and attorneys at the members' discretion. Information and testimony that is clearly irrelevant, unreliable, or unduly inflammatory will not be considered.

(h) The determination of the Panel may be based not only on evidence admissible under the Texas Rules of Evidence, but may be based on information of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.

(i) If the Panel suspends a license or certificate, it shall do so by order and the suspension shall remain in effect for the period of time stated in the order, not to exceed the date a final order is issued by the board in the underlying contested case proceeding.

(j) A temporary suspension under Texas Occupations Code, §1103.5511 or §1104.211 shall not automatically expire after 45 days if the board has scheduled a hearing on the contested case to take place within that time and the hearing is continued beyond the 45th day for any reason other than at the request of the board.

(k) If credible and verifiable information that was not presented to the Panel at a temporary suspension hearing, which contradicts information that influenced the decision of the Panel to order a temporary suspension, is subsequently presented to the Panel with a motion for rehearing on the suspension, the chair of the Panel will schedule a rehearing on the matter. The chair of the Panel will determine, in the chair's sole discretion, whether the new information meets the standard set out in this subsection. A rehearing on a temporary suspension will be limited to presentation and rebuttal of the new information. The chair of the Panel may set reasonable time limits for any oral arguments and evidence to be presented by the parties. Panel members may question witnesses and attorneys. Information and testimony that is clearly irrelevant, unreliable, or unduly inflammatory will not be considered. Any temporary suspension previously ordered will remain in effect, unless the Panel holds a rehearing on the matter and issues a new order rescinding the temporary suspension.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205920
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

CHAPTER 159. RULES RELATING TO THE PROVISIONS OF THE TEXAS APPRAISAL MANAGEMENT COMPANY REGISTRATION AND REGULATION ACT

22 TAC §159.155

The Texas Appraiser Licensing and Certification Board (TALCB) adopts amendments to §159.155, concerning Periodic Review of Appraisals. The amendments are adopted with changes to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7040). Subsection (g)(1) was revised to clarify the purpose for researching and consulting appropriate data sources by adding the following phrase after "appraisal being reviewed": "to, at a minimum, validate the significant characteristics of the comparables and the essential elements of the transactions". Also, subsection (f) is revised to correct a mistake in the statutory cite.

The amendments were proposed at TALCB's August 17, 2012, meeting to clarify the timeframes for review and to provide the minimum standards that an Appraisal Management Company (AMC) must observe when reviewing the work of an appraiser that performs appraisal services for the AMC, for compliance with the Uniform Standards of Professional Appraisal Practice (USPAP) and other standards prescribed by TALCB rules.

The reasoned justification for the amendments to §159.155 is conformity with statutory provisions and greater clarity and as further set out in explanations to comments received below.

Three comments were received by TALCB on the proposed amendments, two from AMCs and one from an attorney who represents AMCs. One commenter was concerned that the scope of the rule as amended applied the same criteria for review whether or not the reviewer reached an opinion of value and did not think this was intended by the Board. That commenter suggested that the Board revise subsection (g) of the proposed amendments to provide one set of criteria for all appraisal reviews and a second set applicable for reviews in which the reviewer chooses to include his or her own opinion of value. That commenter also thought that the reviewer had to be licensed or certified in Texas only when the reviewer reached an opinion of value.

Another commenter stated that a reviewer is not required to replicate the steps completed by the original appraiser under a Standard 3 review and felt that subsection (g)(1) would not allow the reviewer to use the extraordinary assumption permitted under USPAP and would create a significant cost burden on AMCs that was not commensurate with the additional consumer protection that would be provided. The commenter suggested that subsection (g)(1) be revised to add the following phrase to the end of that subsection, "to the extent there is evidence suggesting the data is not accurate." This commenter reasons that adding this phrase "to clarify that validation of underlying data is only necessary when a review reveals concerns with a report's opinions, analyses, and conclusions, helps preserve the use of the extraordinary assumption as permitted by USPAP, and also provides AMCs guidance on what types and sources of data must be consulted to the extent the reviewer identifies concerns." This commenter also requested that subsection (a) be revised to require an AMC to review one of the first five appraisals by a new panel member prior to making the tenth assignment instead of the sixth. The reasoning here was that in peak times, the AMC may not have the time and resources to complete a Standard 3 review of one of the appraisals before making a sixth assignment and might prevent timely valuation services from being provided to Texas consumers. This commenter also submitted supplemental comments which were presented at the Board meeting. The supplemental comments stressed that they feel the use of the extraordinary assumption permitted by USPAP for reviews is necessary to prevent the reviewer from having to "replace all of the information and analysis in the report."

The last commenter objected to having the review requirement at all and reiterated comments made when the rule was originally proposed last year. Since the rule was adopted already and this amendment concerns only a clarification of the scope of the review and not the existence of the review, those comments are not germane.

The Board respectfully disagrees with the commenters. The Board did intend for the standards of review in the amendment to apply to all appraisals reviewed, regardless of whether the reviewer reached an opinion of value. USPAP and the Texas Appraiser Licensing and Certification Act both permit TALCB to impose more restrictive standards than set out in USPAP. TALCB feels that proper consumer protection requires a thorough review of appraisals to ensure the integrity of valuation services managed by AMCs. For this same reason, TALCB also does not believe that the extraordinary assumption permitted under USPAP should be routinely invoked for appraisal reviews. The intention underlying subsection (g)(1) is to make sure that appropriate data sources are consulted so that, at a minimum, the reviewer can validate the significant characteristics of the comparables and the essential elements of the transactions. Subsection (g)(1) was not intended to require the reviewer to replicate all of the steps taken by the original appraiser. This validation process of the review should not significantly increase the costs to AMCs, especially since AMCs are only required to conduct these reviews on a total of 5% of Texas appraisals performed for the AMC in a twelve-month period. However, TALCB does agree that the language of subsection (g)(1) should be revised to clarify the intended scope and therefore changed the language from the text as proposed as noted in the first paragraph of this preamble. The supplemental comments do not change TALCB's position that subsection (g)(1) as revised does not require the review appraiser to in effect replace all information and analysis of the appraiser.

The Board also respectfully disagrees with the suggestion to change the required review of one of the first five appraisals of a new panelist from before making the sixth assignment to before making the tenth assignment. The public policy underlying the review of one of the first five appraisals of a new panelist is to ensure the competency of the appraiser before the AMC makes multiple assignments to that appraiser. Pushing that review off until even more appraisals are assigned and completed defeats the consumer protection intended by this policy.

Finally, there is a misunderstanding on the part of the first commenter that a reviewer has to be licensed or certified in Texas only if an opinion of value is given by the reviewer. Texas Occupations Code, §1104.153 states: "A person who performs an appraisal review for an appraisal management company must be licensed or certified under Chapter 1103 [the Texas Appraiser Licensing and Certification Act] with at least the same certification for the property type as the appraiser who completed the report being reviewed." This means that all reviewers have to be licensed or certified in Texas, regardless of whether the reviewer gives an opinion of value or not. Licensure or certification under Chapter 1103 of the Texas Appraiser Licensing and Certification Act would include certification by reciprocity but does not include registration as a temporary out-of-state appraiser. The changes made to the text of the rule do not require republication since they do not change the rule so much that it can be deemed a different rule, do not affect individuals who would not have been impacted by the rule as proposed and do not impose more stringent requirements for compliance than the proposed version. In fact, both provisions give respondents more rights than under the proposed version.

The amendments are adopted under Texas Occupations Code, §1104.051, which authorizes the TALCB to adopt rules necessary to establish and enforce standards related to appraisal management services.

The statute affected by the amendments is Texas Occupations Code, Chapter 1104. No other statute, code or article is affected by the amendments.

§159.155. Periodic Review of Appraisals.

(a) A registrant shall review the work of appraisers performing appraisal services by performing a review in accordance with Standard 3 of the Uniform Standards of Professional Appraisal Practice (USPAP) of:

(1) one of the first five appraisals performed for the registrant by each appraiser, prior to making a sixth assignment; and

(2) a total of five percent, randomly selected, of the appraisals performed for the AMC for each twelve-month period following the date of the AMC's registration.

(b) Appraisals performed pursuant to subsection (a)(1) of this section shall be counted toward the calculation of five percent for the purposes of subsection (a)(2) of this section.

(c) A review pursuant to subsection (a)(1) of this section is not required if the first five appraisals by an appraiser were completed before the AMC was required by Chapter 1104 of the Texas Occupations Code, to be registered with the Board.

(d) In addition to satisfying the requirements of §1104.153 of the Act, the review appraiser must have access to appropriate data sources for the appraisal being reviewed.

(e) A certified residential appraiser may perform a review of a residential real estate appraisal completed by a certified general appraiser if the review appraiser is otherwise permitted by the Texas Appraiser Licensing and Certification Act to perform the assignment.

(f) An appraiser conducting a review under §1104.155 of the Act and this rule must ensure compliance with the USPAP and with §1104.154 of the Act.

(g) In order to satisfy the requirements of §1104.155 of the Act, this rule and USPAP, a registrant performing a review must adhere to the following minimum scope of work:

(1) research and consult the appropriate data sources for the appraisal being reviewed to, at a minimum, validate the significant characteristics of the comparables and the essential elements of the transactions including:

(A) the multiple listing service(s) or commercial databases and other recognized methods, techniques and data sources for the geographic area in which the appraisal under review was performed, if the appraisal under review included a sales comparison approach;

(B) published cost data sources and other recognized methods, techniques and data sources for the geographic area in which the appraisal under review was performed, if the appraisal under review included a cost approach;

(C) the comparable rental data, income and expense data, and other recognized methods, techniques and data sources for the geographic area in which the appraisal under review was performed, if the appraisal under review included an income approach; and

(D) the sales or listing history of the property which is the subject of the appraisal under review, if that property was sold within the three years prior to the effective date of the appraisal under review or listed for sale as of the effective date of the appraisal under review, the scope of review must include research and consultation of that;

(2) state the reviewer's opinions and conclusions about the work under review for each of the approaches to value utilized in the appraisal under review, including the reason for any disagreements;

(3) identify if the appraisal under review omitted an approach to value, a particular piece of information, or an analysis of either that was necessary for credible assignment results, identify what was omitted and explain why it was necessary for credible assignment results;

(4) identify the client, any intended users and the effective date of the appraisal review;

(5) state that the appraisal review's intended use and purpose is to satisfy the requirements of §1104.155 of the Act and this rule, including ensuring that the appraisal under review complies with the edition of USPAP in effect at the time of the appraisal;

(6) state that the scope of work for the appraisal review is commensurate with the requirements of §1104.155 of the Act, this rule and USPAP in effect at the time of the appraisal review and that the scope of work ensures the development of credible assignment results and that no assignment conditions impose limitations which make the results of the review not credible;

(7) identify the appraisal under review, including:

(A) any ownership interest of the appraiser or reviewer in the property that is the subject of the appraisal under review;

(B) the report date and effective date of the appraisal under review;

(C) the effective date of the opinions or conclusions in the appraisal under review;

(D) the physical, legal, and economic characteristics of the property, properties, property type(s), or market area in the appraisal under review; and

(E) the name of all appraisers who signed or provided significant professional assistance in the appraisal under review;

(8) state clearly and conspicuously, all extraordinary assumptions and hypothetical conditions and state that their use might have affected the review; and

(9) contain a certification which complies with USPAP Standards Rule 3-6.

(h) While not required by §1104.155 of the Act or this rule, if the reviewer elects to develop an opinion of value, review opinion, or real property appraisal consulting conclusion, the review must comply with the additional provisions of USPAP governing the development of an opinion of value, review opinion, or real property appraisal consulting conclusion.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 14, 2012.

TRD-201205921
Kerri T. Galvin
General Counsel
Texas Appraiser Licensing and Certification Board
Effective date: December 4, 2012
Proposal publication date: September 7, 2012
For further information, please call: (512) 936-3576

♦ ♦ ♦

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.17

The Texas State Board of Pharmacy adopts amendments to §291.17, concerning Inventory Requirements. The amendments are adopted with changes to the proposed text as published in September 21, 2012, issue of the *Texas Register* (37 TexReg 7435).

The amendments update and clarify the inventory requirements to be consistent and require all controlled substances to be inventoried on a change of pharmacist-in-charge inventory.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.17. Inventory Requirements.

(a) General requirements.

(1) The pharmacist-in-charge shall be responsible for taking all required inventories, but may delegate the performance of the inventory to another person(s).

(2) The inventory shall be maintained in a written, typewritten, or printed form. An inventory taken by use of an oral recording device must be promptly transcribed.

(3) The inventory shall be kept in the pharmacy and shall be available for inspection for two years.

(4) The inventory shall be filed separately from all other records.

(5) The inventory shall be in a written, typewritten, or printed form and include all stocks of the following drugs on hand on the date of the inventory (including any which are out-of-date):

(A) all controlled substances;

(B) all dosage forms containing nalbuphine (e.g., Nubain); and

(C) for any inventory taken after January 1, 2013, all dosage forms containing tramadol (e.g., Ultram).

(6) The inventory may be taken either as of the opening of business or as of the close of business on the inventory date.

(7) The inventory record shall indicate whether the inventory is taken as of the opening of business or as of the close of business on the inventory date. If the pharmacy is open 24 hours a day, the opening of business shall be 12:01 a.m. and the close of business shall be 12 midnight. The inventory shall indicate that it is a record of drugs on-hand as of the opening or closing of the business day.

(8) The person(s) taking the inventory shall make an exact count or measure of all substances listed in Schedule II.

(9) The person(s) taking the inventory shall make an estimated count or measure of all substances listed in Schedule III, IV, or V and dangerous drugs, unless the container holds more than 1,000 tablets or capsules in which case, an exact count of the contents must be made.

(10) The inventory of Schedule II controlled substances shall be listed separately from the inventory of Schedule III, IV, and V controlled substances which shall be listed separately from the inventory of dangerous drugs.

(11) If the pharmacy maintains a perpetual inventory of any of the drugs required to be inventoried, the perpetual inventory shall be reconciled on the date of the inventory.

(b) Initial inventory.

(1) A new Class A (Community) pharmacy, Class C (Institutional) pharmacy, or Class F (Free Standing Emergency Medical Care Center) pharmacy shall take an inventory on the opening day of business. Such inventory shall include all stocks (including any out-of-date drugs) of the drugs specified in subsection (a)(5) of this section.

(2) In the event the Class A, C, or F pharmacy commences business with none of the drugs specified in subsection (a)(5) of this section on hand, the pharmacy shall record this fact as the initial inventory.

(3) The initial inventory shall serve as the pharmacy's inventory until the next May 1, or until the pharmacy's regular general physical inventory date, at which time the Class A, C, or F pharmacy shall take an annual inventory as specified in subsection (c) of this section. Such inventory may be taken within four days of the specified inventory date and shall include all stocks (including out-of-date drugs).

(c) Annual inventory.

(1) A Class A, C, or F pharmacy shall take an inventory on May 1 of each year, or on the pharmacy's regular general physical inventory date. Such inventory may be taken within four days of the specified inventory date and shall include all stocks (including out-of-date drugs) of the drugs specified in subsection (a)(5) of this section.

(2) A Class A, C, or F pharmacy applying for renewal of a pharmacy license shall include as a part of the pharmacy license renewal application a statement attesting that an annual inventory has been conducted, the date of the inventory, and the name of the person taking the inventory.

(3) The person(s) taking the annual inventory and the pharmacist-in-charge shall indicate the time the inventory was taken (as specified in subsection (a)(7) of this section) and shall sign and date the inventory with the date the inventory was taken. The signature of the pharmacist-in-charge and the date of the inventory shall be notarized within 72 hours or three working days of the completed inventory.

(d) Change of ownership.

(1) A Class A, C, or F pharmacy that changes ownership shall take an inventory of all of the following drugs on the date of the change of ownership. Such inventory shall include all stocks (including any out-of-date drugs) of the drugs specified in subsection (a)(5) of this section.

(2) Such inventory shall constitute, for the purpose of this section, the closing inventory for the seller and the initial inventory for the buyer.

(3) Transfer of any controlled substances listed in Schedule II shall require the use of official DEA order forms (Form 222C).

(4) The person(s) taking the change of ownership inventory and the pharmacist-in-charge shall indicate the time the inventory was taken (as specified in subsection (a)(7) of this section) and shall sign and date the inventory with the date the inventory was taken. The signature of the pharmacist-in-charge and the date of the inventory shall be notarized within 72 hours or three working days of the completed inventory.

(e) Closed pharmacies.

(1) The pharmacist-in-charge of a Class A, C, or F pharmacy that ceases to operate as a pharmacy shall forward to the board, within 10 days of the cessation of operation, a statement attesting that an inventory of the drugs specified in subsection (a)(5) of this section on hand has been conducted, the date of closing, and a statement attesting the manner by which the dangerous drugs and controlled substances possessed by such pharmacy were transferred or disposed.

(2) The person(s) taking the closing inventory and the pharmacist-in-charge shall indicate the time the inventory was taken (as specified in subsection (a)(7) of this section) and shall sign and date the inventory with the date the inventory was taken. The signature of the pharmacist-in-charge and the date of the inventory shall be notarized within 72 hours or three working days of the completed inventory.

(f) Additional requirements for Class C (Institutional) pharmacies.

(1) Perpetual inventory.

(A) A Class C pharmacy shall maintain a perpetual inventory of all Schedule II controlled substances.

(B) The perpetual inventory shall be reconciled on the date of the annual inventory.

(2) Annual inventory. The inventory of the institution shall be maintained in the pharmacy; if an inventory is conducted in other departments within the institution, the inventory of the pharmacy shall be listed separately, as follows:

(A) the inventory of drugs on hand in the pharmacy shall be listed separately from the inventory of drugs on hand in the other areas of the institution; and

(B) the inventory of drugs on hand in all other departments shall be identified by department.

(g) Change of pharmacist-in-charge of a pharmacy.

(1) For an inventory taken after June 1, 2013, on the date of the change of change of the pharmacist-in-charge of a Class A (Community), Class C (Institutional), or Class F (Free Standing Emergency Medical Care Center) pharmacy, an inventory shall be taken. Such inventory shall include all stocks (including any out-of-date drugs) of the drugs specified in subsection (a)(5) of this section. For an inventory taken prior to June 1, 2013, on the date of change of the pharmacist-in-charge of a Class A (Community), Class C (Institutional), or Class F (Free Standing Emergency Medical Care Center) pharmacy, an inventory of the following drugs shall be taken.

(A) all Schedule II controlled substances;

(B) all dosage forms containing pentazocine (e.g., Talwin);

(C) all dosage forms containing phentermine (e.g., Adipex-P, etc.);

(D) all dosage forms containing diazepam (e.g., Valium);

(E) all dosage forms containing phendimetrazine (e.g., Bontril, Prelu-2, etc.);

(F) all dosage forms containing codeine;

(G) all dosage forms containing hydrocodone (e.g., Tussionex, Tussend, Vicodin, etc.);

(H) all dosage forms containing alprazolam (e.g., Xanax);

(I) all dosage forms containing triazolam (e.g., Halcion);

(J) all dosage forms containing butorphanol (e.g., Stadol);

(K) all dosage forms containing nalbuphine (e.g., Nubain);

(L) all dosage forms containing carisoprodol (e.g., Soma); and

(M) for any inventory taken after January 1, 2013, all dosage forms containing tramadol (e.g., Ultram).

(2) This inventory shall constitute, for the purpose of this section, the closing inventory of the departing pharmacist-in-charge and the beginning inventory of the incoming pharmacist-in-charge.

(3) If the departing and the incoming pharmacists-in-charge are unable to conduct the inventory together, a closing inventory shall be conducted by the departing pharmacist-in-charge and a new and separate beginning inventory shall be conducted by the incoming pharmacist-in-charge.

(4) The incoming pharmacist-in-charge shall be responsible for notifying the board within 10 days in writing on a form provided

by the board, that a change of pharmacist-in-charge has occurred. The notification shall include the following:

(A) the name and license number of the departing pharmacist-in-charge;

(B) the name and license number of the incoming pharmacist-in-charge;

(C) the date the incoming pharmacist-in-charge became the pharmacist-in-charge; and

(D) a statement signed by the incoming pharmacist-in-charge attesting that:

(i) an inventory has been conducted by the departing and incoming pharmacists-in-charge; if the inventory was not taken by both pharmacists, the statement shall provide an explanation; and

(ii) the incoming pharmacist-in-charge has read and understands the laws and rules relating to this class of pharmacy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205939
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 5, 2012
Proposal publication date: September 21, 2012
For further information, please call: (512) 305-8028

♦ ♦ ♦

SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74

The Texas State Board of Pharmacy adopts amendments to §291.74, concerning Operational Standards. The amendments are adopted without changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7437).

The amendments allow Class C (Institutional) pharmacies to restock automated medication supply systems if the drugs are labeled and verified with a machine readable product identifier, such as a barcode, and the drugs are in tamper evident product packaging, packaged by an FDA registered repackager or manufacture and shipped to the pharmacy for the automated medication supply system.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205940
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 5, 2012
Proposal publication date: September 21, 2012
For further information, please call: (512) 305-8028

♦ ♦ ♦

SUBCHAPTER E. CLINIC PHARMACY (CLASS D)

22 TAC §291.93

The Texas State Board of Pharmacy adopts amendments to §291.93, concerning Operational Standards. The amendments are adopted without changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7438).

The amendments clarify the labeling requirements in Class D pharmacies for medications provided to the patient's partner or family member if the drug prescribed is for a sexually transmitted disease or for an illness determined by the Centers for Disease Control and Prevention, the World Health Organization, or the Governor's office to be pandemic, and eliminate Carisoprodol from the formulary, since it is now a controlled substance.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205941
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 5, 2012
Proposal publication date: September 21, 2012
For further information, please call: (512) 305-8028

♦ ♦ ♦

SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy adopts amendments to §291.104, concerning Operational Standards in a Non-Resident Pharmacy (Class E). The amendments are adopted without changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7438).

The amendments update the requirements for pharmacists in Class E pharmacies to notify the Texas Department of Public Safety when dispensing Schedule II - V controlled substance prescriptions.

No comments were received.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205942
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 5, 2012
Proposal publication date: September 21, 2012
For further information, please call: (512) 305-8028

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 1. MISCELLANEOUS PROVISIONS
SUBCHAPTER V. AUTOLOGOUS ADULT STEM CELL BANKS

25 TAC §1.451

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §1.451, concerning criteria for establishing and operating autologous adult stem cell banks, without changes to the proposed text as published in the August 3, 2012, issue of the *Texas Register* (37 TexReg 5711) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

This new subchapter will implement Senate Bill (SB) 7, Article 14, 82nd Legislature, First Called Session, 2011, which added new Health and Safety Code, Chapter 1003, (regarding Autologous Stem Cell Bank for Recipients of Blood and Tissue Components Who Are the Live Human Donors of the Adult Stem Cells). Health and Safety Code, Chapter 1003 requires the Executive Commissioner of the Health and Human Services Commission to establish by rule eligibility criteria for the creation and operation of an autologous adult stem cell bank, if the Executive Commissioner determines that it will be cost-effective and will increase the efficiency or quality of health care, health and human services, and health benefits programs in this state to do so. The Executive Commissioner and the department have determined the cost-effectiveness and efficiency of the implementation of Health and Safety Code, Chapter 1003.

SECTION-BY-SECTION SUMMARY

New §1.451 implements Health and Safety Code, Title 12, Chapter 1003 by setting out establishment and operation criteria for autologous adult stem cell banks in Texas. The guidelines for autologous adult stem cell banks require a governing body, which is responsible for facility organization, management, control, staffing, and operation. The governing body must be formally organized with written bylaws and a constitution and is responsible for adoption, implementation, and enforcement of facility policies and procedures. Autologous adult stem cell banks also must use current scientific standards; ensure that services are provided safely and effectively complying with all state and federal laws and regulations; and adopt and implement an ongoing quality assessment and performance improvement program.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared a response to a comment received regarding the proposed rule during the comment period, which the commission has reviewed and accepts. The only commenter was the Texas Medical Board.

Comment: The commenter stated that they found the language appropriate and consistent with Health and Safety Code, Chapter 1003, and did not have any suggested changes to the proposed language.

Response: The commission appreciates the comment. No change was made as a result of the comment.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The new section is authorized by Health and Safety Code, §1003.001; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 13, 2012.

TRD-201205896
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 3, 2012
Proposal publication date: August 3, 2012
For further information, please call: (512) 776-6990

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

SUBCHAPTER A. WATER CONSERVATION PLANS

30 TAC §§288.1 - 288.5

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§288.1 - 288.5.

Section 288.1 and §288.2 are adopted with changes to the proposed text as published in the July 13, 2012, issue of the *Texas Register* (37 TexReg 5216). Sections 288.3 - 288.5 are adopted without changes to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2011, the 82nd Legislature passed Senate Bill (SB) 181, relating to the calculation and reporting of water usage by municipalities and water utilities for state water planning and other purposes. The 82nd Legislature also passed SB 660, related to the review and functions of the Texas Water Development Board (TWDB), including the functions of the board and related entities in connection with the reporting of municipal water use data.

SB 181 amended Texas Water Code (TWC), Chapter 16, related to provisions generally applicable to water development. SB 660 amended TWC, Chapter 16, and TWC, Chapter 11, related to water rights.

SB 181 added TWC, §16.403, and SB 660 amended TWC, §16.402 and added TWC, §16.403, to require that the TWDB and the TCEQ, in consultation with the Water Conservation Advisory Council (WCAC), develop a uniform, consistent methodology and guidance for calculating and reporting water use and conservation. For a municipality or water utility, the bills require a method of calculating total water use, a method of calculating total water use in gallons per capita per day (GPCD), a method of classifying water users within sectors, a method of calculating water use in the non-population dependent sectors, and guidelines on the use of service populations. The methodology and guidance applies to all entities required to submit water conservation plans to the TWDB or the TCEQ. Additionally, the bills require that the TWDB, the TCEQ, and the WCAC develop a data collection and reporting program for municipalities and water utilities with more than 3,300 connections.

SB 181 added TWC, §16.404, and SB 660, §21, amended TWC, §16.402 and §11.1271, to require entities to report the most detailed level of water use possible, but specified that entities cannot be required to report at a higher level than their current billing systems allow. SB 181 specifies that the rules may require that new billing systems purchased be capable of reporting water use according to the prescribed methodology.

SB 660 amended TWC, §11.1271 and §16.402, to require the TCEQ, or the TCEQ and TWDB, to jointly adopt rules by January 1, 2013, requiring the methodology and guidance for calculating water use and conservation developed under TWC, §16.403, to be used in water conservation plans or reports.

This adopted rulemaking will implement the amendments made by SB 181 and §21 of SB 660.

Section by Section Discussion

The commission adopts the amendment to §288.1, concerning Definitions, by adding definitions for commercial use, institutional use, residential use, residential GPCD, total use, total GPCD, and wholesale use, and to renumber the paragraphs to accommodate the addition of definitions. The adopted definitions for commercial use in §288.1(5), institutional use in §288.1(8), and wholesale use in §288.1(25) were derived from the identified definitions of these uses by the American Water Works Association. The adopted definitions for residential use in §288.1(16) and residential GPCD in §288.1(17) were derived from TWC, §16.403(b)(4), as added by SB 181, which requires a method of calculating water use in the residential sector that includes both single-family and multifamily residences, in GPCD. In response to a comment, the commission modified the definition in §288.1(17) to clarify that the numerator in the calculation is residential gallons sold. The adopted definition for total use in §288.1(21) was derived from TWC, §16.403(b)(1), as added by SB 181, which requires a method of calculating total use by a municipality or water utility, including water billed and nonrevenue water used. The adopted definition for total GPCD in §288.1(22) was derived from TWC, §16.403(b)(2), as added by SB 181, which requires a method of calculating total water use by a municipality or water utility in GPCD.

The commission adopts the definitions for industrial use, irrigation use, and municipal use. The definition of industrial use in §288.1(7) was amended to remove commercial fish production (aquaculture) which was defined as an agricultural use by the 82nd Legislature in HB 2694, which amended TWC, §11.002(12)(G). The commission adopts the definition of irrigation use in §288.1(9) to change "through a municipal distribution system" to "from a public water supplier" to be consistent with the terminology used throughout the remainder of Chapter 288. The commission adopts the definition of municipal use in §288.1(12) to remove the various listed examples of municipal uses and instead list the sectors of water use required by SB 181 and SB 660, §21.

The commission deleted the definitions for municipal per capita water use in §288.1(10) and municipal use in GPCD in §288.1(12). These definitions are no longer needed because SB 181 and SB 660, §21 require municipal use to be reported in the adopted definitions for residential use in §288.1(16); residential GPCD in §288.1(17); total use in §288.1(21); and, total GPCD in §288.1(22). The commission renumbered the paragraphs to accommodate the deletion of the definitions.

The definitions that were added, amended, or deleted are necessary to implement SB 181 and SB 660, §21.

The commission adopts the amendment to §288.2, Water Conservation Plans for Municipal Uses by Public Water Suppliers, to implement the requirements of SB 181 and SB 660, §21.

The commission adopts the amendment to §288.2(a)(1) by deleting the word "drinking" from "public drinking water suppliers" to ensure consistency of terms throughout Chapter 288.

The commission adopts the amendment to §288.2(a)(1)(A) by adding "in accordance with the Texas Water Use Methodology" to the requirements for utility profiles of water conservation plans. This uniform methodology, required by the bills, is currently being developed by the TWDB, TCEQ, and WCAC. This amendment also adds "(including total GPCD and residential GPCD)" with respect to the water use data provided in these utility profiles. SB 181 and SB 660, §21 require that municipalities or water utilities report GPCD values in both total GPCD and residential GPCD.

The commission adopts §288.2(a)(1)(B) to require the sector-based water use reporting as required by SB 181 and SB 660, §21. This new requirement also specifies that water suppliers do not need to purchase new software immediately, but will need to purchase the appropriate software when upgrading.

The commission deleted existing §288.2(a)(1)(B). The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language.

The commission adopts the amendment to §288.2(a)(1)(C) to remove the date reference "beginning May 1, 2005." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning. The commission specifies that the goals for municipal use be in total GPCD and residential GPCD. This change is adopted to ensure that the water use data in §288.2(a)(1)(A) and this subparagraph are consistent.

The commission adopts the amendment to §288.2(a)(1)(F) by removing the term "unaccounted-for uses of" and add "loss" to the word "water." The term "water loss" is the appropriate semantic for reporting.

The commission adopts the amendment to §288.2(a)(2)(A) by removing "in order to control unaccounted-for uses of water" because this is an inappropriate semantic for referring to water loss.

The commission deleted existing §288.2(a)(2)(B) which, previous to SB 181 and SB 660, was an additional content requirement for reporting by sectors and to re-letter the subparagraphs that follow. The sector-based reporting requirement was added in adopted §288.2(a)(1)(B).

The commission adopts the amendment to §288.2(c) to remove the date references "Beginning May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663 passed by the 78th Legislature in 2003. The May 1, 2009, date was originally incorporated into the rule based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission deleted §288.3(a)(2) and renumbered the paragraphs that follow. The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for industrial water users to submit water conservation goals for water conservation plans are now located in adopted §288.3(a)(2).

The commission adopts the amendment to renumbered §288.3(a)(2) to remove the date reference "beginning, May 1, 2005." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission adopts the amendment to §288.3(b) to remove the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663 passed by the 78th Legislature in 2003. The May 1, 2009, date was originally incorporated into the rules based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language, as well as "after that date", are no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission deleted current §288.4(a)(1)(B) and re-lettered the subparagraphs that follow. The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for individual agricultural users to submit water conservation goals for water conservation plans are now located in re-lettered §288.4(a)(1)(B).

The commission adopts the amendment to re-lettered §288.4(a)(1)(B) to remove the date reference "beginning, May 1, 2005." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission deleted current §288.4(a)(2)(D) and re-lettered the subparagraphs that follow. The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because these deadlines have passed, they are no longer needed in the current rule language. The requirements for individual irrigation users to submit water conservation goals for water conservation plans are now located in adopted §288.4(a)(2)(D).

The commission adopts the amendment to re-lettered §288.4(a)(2)(D) by removing the date reference "beginning, May 1, 2005." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legisla-

ture in 2003. Because these deadlines have passed, they are no longer needed in the current rule language. The amendment does not alter the requirements for entities to submit revised water conservation plans for every five years to coincide with regional water planning.

The commission deleted current §288.4(a)(3)(B) and re-lettered the subparagraphs that follow. The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for systems providing agricultural water to more than one user to submit water conservation goals for water conservation plans are now located in adopted §288.4(a)(3)(B).

The commission adopts the amendment to re-lettered §288.4(a)(3)(B) by removing the date reference "beginning, May 1, 2005." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission adopts the amendment to §288.4(c) by removing the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. The May 1, 2009, date was originally incorporated into the rule based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

The commission deleted current §288.5(1)(B) and re-lettered the subparagraphs that follow. The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because this deadline has passed, it is no longer needed in the current rule language. The requirements for wholesale water suppliers to submit water conservation goals for water conservation plans are now in adopted §288.5(1)(B).

The commission adopts the amendment to re-lettered §288.5(1)(B) by removing the date reference "beginning, May 1, 2005." This date was originally added to implement HB 2660 and HB 2663, as passed by the 78th Legislature in 2003. Because the deadline has passed it is no longer needed in the current rule language. This amendment does not alter the requirement for entities to submit revised water conservation plans every five years to coincide with regional water planning. The commission also removed the term "unaccounted for" and added "loss" to the word "water" because the term "water loss" is the appropriate semantic for reporting.

The commission adopts the amendment to §288.5(3) to remove the date references "Beginning, May 1, 2005," "not later than May 1, 2009," and "after that date." The May 1, 2005, date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. The May 1, 2009, date was originally incorporated into the rules based on comments received during a 2004 agency rulemaking amending §§288.2 - 288.5. Because these deadlines have passed, this language as well as "after that date" are no longer needed in the current rule language. The adopted amendment does not alter the requirements for entities to submit revised water conservation plans every five years to coincide with regional water planning.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule amendments to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by SB 181 and SB 660, which require public water suppliers to utilize the uniform methodology and guidance for calculating water use and conservation developed under TWC, §16.403 to be used in the water conservation plans and reports that must be submitted to the TCEQ.

Further, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted amendments is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendments: 1) do not exceed a standard set by federal law; 2) do not exceed an express requirement of state law; 3) do not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the rules; and 4) are not an adoption of a rule solely under the general powers of the commission as the rules are required by SB 181 and SB 660.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment

period. The commission did not receive any comments regarding this section of the preamble.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted this rulemaking for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The adopted rulemaking amends §§288.1 - 288.5. The commission's analysis revealed that amending these rule sections would achieve consistency with TWC, §§11.1271(f), 16.402, 16.403, and 16.404 as added or amended in 2011 by SB 181 and SB 660. The adopted rulemaking would create new definitions and amend or delete other definitions in §288.1. The adopted definitions define the different categories of water use that must be reported by public water suppliers in their water conservation plans; and are consistent with the terms used by the Legislature in SB 181 and SB 660. The adopted rulemaking would also require public water suppliers to utilize the uniform methodology and guidance for calculating water use and conservation developed under TWC, §16.403, to be used in the water conservation plans and reports that must be submitted to the TCEQ as required by the TWC.

A "taking" under Texas Government Code, Chapter 2007, means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by creating, amending, or deleting the definitions as adopted or requiring public water suppliers to utilize the uniform methodology and guidance in producing the water conservation plans, the commission has determined that promulgation and enforcement of this adopted rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the adopted rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the adopted rulemaking. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the adopted rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. The commission did not receive any comment regarding this part of the preamble.

Public Comment

The commission held a public hearing on August 7, 2012, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. No one requested to speak at the public hearing. The commission received written comments from the City of Dallas, Dallas Water Utilities (Dallas Water Utilities), City of Fort Worth Water Department (City of Fort Worth), Tarrant Regional Water District (TRWD), Texas Water Foundation (TWF) and one individual.

Dallas Water Utilities, City of Fort Worth, TRWD and TWF suggested changes to the rule as noted in the Response to Comments section of this preamble. One commenter expressed concerns about city growth and water quality issues.

Response to Comments

General

One individual commented that the City of Cypress continues to grow in an unsustainable way and noted that the bacteria in the waterways are a side effect of unsustainable growth. The commenter also suggested that action needs to be taken to reduce runoff from the homes, parking lots, and streets in order to reduce the amount of polluted runoff into our waterways as well as suggesting several additional ways to reduce runoff. The commenter stated that retention ponds currently function only as flood basins and mosquito breeding grounds and suggested requiring neighborhoods to convert these areas to more natural environments. The commenter also suggested that permeable alternatives to concrete for pathways be encouraged and promoted. The commenter also expressed concern with surface water quality and suggested that watershed awareness is necessary.

The commission acknowledges these comments; however, notes that these comments fall outside of the scope of this rulemaking. This rulemaking is to implement SB 181 and SB 660 which require sector based water use reporting for entities that are required to submit water conservation plans to the TCEQ or the TWDB. No changes were made in response to these comments.

The City of Fort Worth commented that the "Texas Water Use Methodology" is still being developed but that the proposed rule includes this methodology as a required method of reporting. The City of Fort Worth asked when utilities will have an opportunity to comment on the water use methodology.

This rule includes this methodology as a required method of reporting to ensure a consistent methodology for calculating water use. SB 181 added TWC, §16.403(b), that requires the TWDB and the commission, in consultation with the WCAC, to develop a uniform consistent methodology and guidance for calculating water use and conservation to be used by a municipality or a water utility in developing water conservation plans and preparing reports required under the TWC.

The TWDB, the commission, and the WCAC developed the guidance document which is scheduled to be completed and available to the public in early 2013. The WCAC accepted comments on this document through September 14, 2012. No change was made in response to this comment.

The City of Fort Worth asked how sector based water use would be reported.

The guidance and methodology being developed by the commission, the TWDB, and the WCAC will describe how to report water use by sector. The commission and the TWDB are also in the process of revising the utility profile forms for use by entities that are developing or revising water conservation plans. No changes were made in response to this comment.

The City of Forth Worth stated that it does not have a classification for "institutional" and asked if they would be required to reclassify their accounts, citing concerns about the intensity of labor required to complete this task.

This rulemaking does not require a water system to classify its users as "institutional" or to use an accounting system capable of reporting the sector based water use described in this rulemaking; however, any new software purchases must be capable of reporting detailed water use as described in this rule. This includes the category "institutional." Until a water system purchases new accounting software, a water system may continue to use its existing software. No changes were made in response to this comment.

TRWD commented that the definition of "Nursery Grower" defines a grower as an individual person and suggested a change to this definition. TRWD also commented direct and indirect reuse are important and viable means of extending water supplies and requested that definitions for direct reuse and indirect reuse be added to Chapter 288 as well as requesting a definition be added for the term "water loss." Additionally, TRWD stated that it does not have the authority to change its rates to seasonal or inclining block rates and recommended this be addressed in the rule or the guidance document. TRWD also commented that references to flat rates or decreasing block rates may not be necessary or appropriate. TRWD also suggested adding some other technologies used in scheduling and measuring the amount of water applied for individual irrigation users such as evapotranspiration/weather based irrigation controllers.

The commission acknowledges these comments; however, notes that these comments fall outside of the scope of this rulemaking. This rulemaking is to implement SB 181 and SB 660 which require sector based water use reporting for entities that are required to submit water conservation plans to the TCEQ or the TWDB. No changes were made in response to these comments.

§288.1, Definitions

Dallas Water Utilities suggested that the definition for "Best management practices" in §288.1(3) be amended to add the words "duplicated and" before the word "implemented."

The purpose of this rulemaking is to implement SB 181 and SB 660 which require sector based water use reporting for entities that are required to submit water conservation plans to the TCEQ or the TWDB. Changing the definition of "Best management practices" is outside of the scope of implementing these bills through this rulemaking. No changes were made in response to this comment.

TRWD commented that the definition of irrigation makes it appear that golf courses and parks are classified as pastureland and suggested a different definition for irrigation.

The commission does not agree that the definition of irrigation in adopted §288.1(9) classifies golf courses and parks as pastureland. In this definition, golf course and parks are included solely as examples of lands that are irrigated. No changes were made in response to this comment.

The City of Fort Worth commented that the calculation for "municipal per capita water use" and the definition for "municipal use in gallons per capita per day" are missing the words "divided by number of days in the year."

The definitions of "municipal per capita water use" and "municipal use in gallons per capita per day" are being deleted from §288.1. These definitions are no longer needed because SB 181 and SB 660, §21, require municipal use to be reported in the adopted definitions for residential use in §288.1(16); residential GPCD in §288.1(17); total use in §288.1(21); and, total GPCD in §288.1(22). No changes were made in response to these comments.

TWF requested that the commission modify the definition of "residential GPCD" to clarify that the numerator in the calculation is residential gallons sold. TWF commented that the definition, as it is written now, implies that the numerator is total gallons sold.

The commission agrees with the comment and has modified the definition of "Residential gallons per capita per day" in §288.1(17) to read, as suggested by the commenter: "The total gallons sold for residential use by a public water supplier divided by the residential population served and then divided by the number of days in the year."

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out duties under the TWC; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; §5.105, which establishes the commission's authority to set policy by rule; §11.1271, which requires the commission to adopt rules regarding the methodology and guidance for calculating water use and conservation developed under §16.403 to be used in the water conservation plans; §16.402, which requires the commission to adopt rules regarding the methodology and guidance for calculating water use and conservation developed under §16.403; and §16.404, which requires the commission to adopt rules and standards as necessary to implement TWC, Subchapter K.

The adopted rules implement TWC, §§11.1271, 16.402, 16.403, and 16.404.

§288.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agricultural or Agriculture--Any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Best management practices--Voluntary efficiency measures that save a quantifiable amount of water, either directly or indirectly, and that can be implemented within a specific time frame.

(4) Conservation--Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(5) Commercial use--The use of water by a place of business, such as a hotel, restaurant, or office building. This does not include multi-family residences or agricultural, industrial, or institutional users.

(6) Drought contingency plan--A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(7) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, and the development of power by means other than hydroelectric, but does not include agricultural use.

(8) Institutional use--The use of water by an establishment dedicated to public service, such as a school, university, church, hospital, nursing home, prison or government facility. All facilities dedicated to public service are considered institutional regardless of ownership.

(9) Irrigation--The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water from a public water supplier.

(10) Irrigation water use efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(11) Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field re-pressuring.

(12) Municipal use--The use of potable water provided by a public water supplier as well as the use of sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses.

(13) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(14) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(15) Public water supplier--An individual or entity that supplies water to the public for human consumption.

(16) Residential use--The use of water that is billed to single and multi-family residences, which applies to indoor and outdoor uses.

(17) Residential gallons per capita per day--The total gallons sold for residential use by a public water supplier divided by the residential population served and then divided by the number of days in the year.

(18) Regional water planning group--A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(19) Retail public water supplier--An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(20) Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(21) Total use--The volume of raw or potable water provided by a public water supplier to billed customer sectors or nonrevenue uses and the volume lost during conveyance, treatment, or transmission of that water.

(22) Total gallons per capita per day (GPCD)--The total amount of water diverted and/or pumped for potable use divided by the total permanent population divided by the days of the year. Diversion volumes of reuse as defined in this chapter shall be credited against total diversion volumes for the purposes of calculating GPCD for targets and goals.

(23) Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(24) Wholesale public water supplier--An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

(25) Wholesale use--Water sold from one entity or public water supplier to other retail water purveyors for resale to individual customers.

§288.2. Water Conservation Plans for Municipal Uses by Public Water Suppliers.

(a) A water conservation plan for municipal water use by public water suppliers must provide information in response to the following. If the plan does not provide information for each requirement, the public water supplier shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. All water conservation plans for municipal uses by public water suppliers must include the following elements:

(A) a utility profile in accordance with the Texas Water Use Methodology, including, but not limited to, information regarding population and customer data, water use data (including total gallons per capita per day (GPCD) and residential GPCD), water supply system data, and wastewater system data;

(B) a record management system which allows for the classification of water sales and uses into the most detailed level of water use data currently available to it, including, if possible, the sectors listed in clauses (i) - (vi) of this subparagraph. Any new billing system purchased by a public water supplier must be capable of reporting detailed water use data as described in clauses (i) - (vi) of this subparagraph:

(i) residential;

(I) single family;

(II) multi-family;

(ii) commercial;

(iii) institutional;

(iv) industrial;

(v) agricultural; and,

(vi) wholesale.

(C) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total GPCD and residential GPCD. The goals established by a public water supplier under this subparagraph are not enforceable;

(D) metering device(s), within an accuracy of plus or minus 5.0% in order to measure and account for the amount of water diverted from the source of supply;

(E) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(F) measures to determine and control water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections; abandoned services; etc.);

(G) a program of continuing public education and information regarding water conservation;

(H) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(I) a reservoir systems operations plan, if applicable, providing for the coordinated operation of reservoirs owned by the applicant within a common watershed or river basin in order to optimize available water supplies; and

(J) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the water supplier; and

(ii) a description of the authority by which the water supplier will implement and enforce the conservation plan; and

(K) documentation of coordination with the regional water planning groups for the service area of the public water supplier in order to ensure consistency with the appropriate approved regional water plans.

(2) Additional content requirements. Water conservation plans for municipal uses by public drinking water suppliers serving a current population of 5,000 or more and/or a projected population of 5,000 or more within the next ten years subsequent to the effective date of the plan must include the following elements:

(A) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system;

(B) a requirement in every wholesale water supply contract entered into or renewed after official adoption of the plan (by either ordinance, resolution, or tariff), and including any contract extension, that each successive wholesale customer develop and implement a water conservation plan or water conservation measures using the applicable elements in this chapter. If the customer intends to resell the water, the contract between the initial supplier and customer must provide that the contract for the resale of the water must have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures in accordance with the provisions of this chapter.

(3) Additional conservation strategies. Any combination of the following strategies shall be selected by the water supplier, in addition to the minimum requirements in paragraphs (1) and (2) of this subsection, if they are necessary to achieve the stated water conservation goals of the plan. The commission may require that any of the following strategies be implemented by the water supplier if the commission determines that the strategy is necessary to achieve the goals of the water conservation plan:

(A) conservation-oriented water rates and water rate structures such as uniform or increasing block rate schedules, and/or seasonal rates, but not flat rate or decreasing block rates;

(B) adoption of ordinances, plumbing codes, and/or rules requiring water-conserving plumbing fixtures to be installed in new structures and existing structures undergoing substantial modification or addition;

(C) a program for the replacement or retrofit of water-conserving plumbing fixtures in existing structures;

(D) reuse and/or recycling of wastewater and/or graywater;

(E) a program for pressure control and/or reduction in the distribution system and/or for customer connections;

(F) a program and/or ordinance(s) for landscape water management;

(G) a method for monitoring the effectiveness and efficiency of the water conservation plan; and

(H) any other water conservation practice, method, or technique which the water supplier shows to be appropriate for achieving the stated goal or goals of the water conservation plan.

(b) A water conservation plan prepared in accordance with 31 TAC §363.15 (relating to Required Water Conservation Plan) of the Texas Water Development Board and substantially meeting the requirements of this section and other applicable commission rules may be submitted to meet application requirements in accordance with a memorandum of understanding between the commission and the Texas Water Development Board.

(c) A public water supplier for municipal use shall review and update its water conservation plan, as appropriate, based on an assessment of previous five-year and ten-year targets and any other new or updated information. The public water supplier for municipal use shall review and update the next revision of its water conservation plan every five years to coincide with the regional water planning group.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205949
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 6, 2012
Proposal publication date: July 13, 2012
For further information, please call: (512) 239-2141

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §363.15

The Texas Water Development Board (TWDB) adopts an amendment to §363.15, concerning Required Water Conservation Plan, with changes to the proposed text as published in the October 5, 2012, issue of the *Texas Register* (37 TexReg 7977). The amendment is adopted with one non-substantive technical correction.

DISCUSSION OF THE ADOPTED AMENDMENT

Background and Summary of the Factual Basis for the Adopted Rule

In 2011, the 82nd Legislature passed Senate Bill (SB) 181, amending Texas Water Code (TWC), Chapter 16, regarding the calculation and reporting of water usage by municipalities and water utilities for state water planning and other purposes. The 82nd Legislature also passed SB 660, amending TWC, Chapter 16, and TWC, Chapter 11, regarding the functions of the TWDB and related entities in connection with the reporting of municipal water use data.

SB 181 added TWC §16.403, and SB 660 amended TWC §16.402 and added TWC §16.403, to require that the TWDB and the Texas Commission on Environmental Quality (TCEQ), in consultation with the Water Conservation Advisory Council (WCAC), develop a uniform, consistent methodology and guidance for calculating and reporting water use and conservation to be used by municipalities and other water utilities in developing water conservation plans and preparing reports required under the TWC. TWC §16.402 and §16.403 require that the methodology and guidance include a method of calculating total water use, a method of calculating total water use in gallons per capita per day (GPCD), a method of classifying water users within sectors, a method of calculating water use in the residential sector that includes both single-family and multifamily residences in GPCD, a method of calculating water use in the non-population dependent sectors, and guidelines on the use of service populations in developing a per-capita-based method of calculation. The methodology and guidance applies to all entities required to submit water conservation plans to the TWDB or the TCEQ. Additionally, the TWDB, in consultation with the TCEQ and WCAC, shall develop a data collection and reporting program for municipalities and other water utilities with more than 3,300 connections.

SB 181 added TWC §16.404, and SB 660 amended TWC §16.402 and §11.1271, to require the TWDB and TCEQ to adopt rules requiring the use of the methodology and guidance. The rules must require entities to report the most detailed level of water use possible, but cannot require entities to report at a higher level of detail than their current billing systems allow.

The adopted rules will implement the amendments made by SB 181 and §21 of SB 660.

Section by Section Discussion

The TWDB adopts amendments to §363.15, regarding Required Water Conservation Plan, to implement the requirements of TWC §§16.402, 16.403, and 16.404.

The TWDB adopts amendments to §363.15(b) by deleting the May 1, 2005 start date for five-year and ten-year targets for water savings. The May 1, 2005 date was originally added to implement HB 2660 and HB 2663, passed by the 78th Legislature in 2003. Because it is more than five years since this date and the rule requires a new or revised water conservation plan that has been in effect for less than five years, this date is no longer needed.

The TWDB adopts amendments to §363.15(b)(1)(A) by adding the requirement that the utility profile in a water conservation plan must include data developed "in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Water Code §16.403" in order to comply with the requirement in TWC §16.402 and §16.404 that the TWDB adopt rules requiring the use of the methodology and guidance. The methodology and guidance is currently being developed by the TWDB and TCEQ in consultation with the WCAC and will not be finalized until the end of 2012. In addition, this amendment adds the requirement that the utility profile required in a water conservation plan include the classification of

water sales and uses at the most detailed level of water use data currently available, in order to comply with the requirements of TWC §16.402(f) and §16.404 that the rules require an entity to report the most detailed level of municipal water use data currently available to the entity, but not to report data that is more detailed than the entity's billing system is capable of producing. This amendment also requires that the utility profile include the most detailed level of water use data currently available for the sectors identified in TWC §16.403.

Section 363.15(b)(1)(A) is adopted with one non-substantive technical correction. The reference to "Texas Water Code" has been modified to "Water Code" to be consistent with the reference to the Water Code in §363.15(c).

The TWDB adopts amendments to §363.15(b)(1)(B) to specify that the goals for municipal use be in total GPCD and residential GPCD, in order to assure that the water use data in the utility profile is consistent with the goals for municipal use. The adopted amendments also define "municipal use" as "the use of potable water or sewage effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption." This amendment clarifies the use of the term "municipal use" in TWC §11.1271(c), which requires goals for "municipal use" in GPCD. The amendment is consistent with the TCEQ's definition of "municipal use" in 30 TAC §288.1 as that term is used in 30 TAC §288.2(a)(1)(C) and is consistent with the requirement in TWC §16.403(b)(2) and (4) that water use by a municipality or other water utility be reported in both total GPCD and residential GPCD.

The TWDB adopts amendments to §363.15(c) to add a comma for grammatical correctness.

The TWDB adopts amendments to §363.15(g)(1) to delete the reference to "May 1, 2010" as the deadline for the filing of the first report on an entity's progress in implementing each of the minimum requirements in the water conservation plan, since this date has already passed, and instead requires the report annually every May 1st.

PUBLIC COMMENTS

No public comments were received on the proposed rulemaking.

STATUTORY AUTHORITY

The amendment is adopted under the authority of TWC §6.101, which provides the TWDB with the authority to adopt rules necessary to carry out the powers and duties in the TWC and other laws of the State, and also under the authority of TWC §16.402(e), which requires the TWDB and the TCEQ to jointly adopt rules requiring the methodology and guidance for calculating water use and conservation developed under TWC §16.403 to be used in the water conservation annual reports required by TWC §16.402(b).

This rulemaking affects TWC, Chapters 15, 16, and 17.

§363.15. Required Water Conservation Plan.

(a) An applicant, if not eligible for an exemption under subsection (c) of this section, shall submit, with its application, two copies of its water conservation plan for approval. The executive administrator shall review all water conservation plans submitted as part of an application for financial assistance for a project and shall determine if the plans meet the requirements of this section.

(b) The water conservation plan required under subsection (a) of this section must be new or revised to include five-year and ten-year targets for water savings, unless the applicant has implemented an approved water conservation plan that meets the requirements of this section, and that has been in effect for less than five years. The water conservation plan shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data at the most detailed level of water use data currently available and in accordance with the methodology and guidance for calculating water use and conservation developed and maintained by the executive administrator in coordination with the commission under Water Code §16.403. The utility profile must include the classification of water sales and uses for the following sectors, as appropriate:

(i) residential;

(I) single-family;

(II) multi-family;

(ii) commercial;

(iii) institutional;

(iv) industrial;

(v) agricultural; and

(vi) wholesale.

(B) specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use in total gallons per capita per day and residential gallons per capita per day. As used herein, "municipal use" means the use of potable water or sewer effluent for residential, commercial, industrial, agricultural, institutional, and wholesale uses by an individual or entity that supplies water to the public for human consumption;

(C) a schedule for implementing the plan to achieve the applicant's targets and goals;

(D) a method for tracking the implementation and effectiveness of the plan;

(E) a master meter to measure and account for the amount of water diverted from the source of supply;

(F) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(G) measures to determine and control water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections, abandoned services, etc.);

(H) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system;

(I) a program of continuing public education and information regarding water conservation;

(J) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(K) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the applicant; and

(ii) a description of the authority by which the applicant will implement and enforce the conservation plan;

(L) documentation that the regional water planning groups for the service area of the applicant have been notified of the applicant's water conservation plan; and

(M) a current drought contingency plan which includes specific water supply or water demand management measures and, at a minimum, includes, trigger conditions, demand management measures, initiation and termination procedures, a means of implementation, and measures to educate and inform the public regarding the drought contingency plan.

(2) Additional conservation strategies. The water conservation plan may also include any other water conservation practice, method, or technique that the applicant deems appropriate.

(c) Pursuant to Water Code §§15.106(c), 17.125(c), 17.277(c), and 17.857(c), an applicant is not required to provide a water conservation plan if the board determines an emergency exists; the amount of financial assistance to be provided is $500,000 or less; or the board finds that implementation of a water conservation program is not reasonably necessary to facilitate water conservation; or the application is for flood control purposes under Water Code, Chapter 17, Subchapter G.

(1) An emergency exists when:

(A) a public water system or wastewater system has already failed, or is in a condition which poses an imminent threat of failure, causing the health and safety of the citizens served to be endangered;

(B) sudden, unforeseen demands are placed on a water system or wastewater system (i.e., because of military operations or emergency population relocation);

(C) a disaster has been declared by the governor or president; or

(D) the governor's Division of Emergency Management of the Texas Department of Public Safety has determined that an emergency exists.

(2) If the board determines that an emergency exists and commits to financial assistance without requiring a water conservation plan, the applicant must report whether the emergency continues to exist every six months after the board commits to financial assistance. If the Executive Administrator finds that the emergency no longer exists, the applicant must submit a water conservation plan within six months of the finding.

(d) Pursuant to Water Code §§15.106(d)(e), 15.208(d), 17.125(e), 17.277(e), and 17.857(e), if the applicant will utilize the project financed by the board to furnish water or wastewater services to another entity that in turn will furnish the water or wastewater services to the ultimate consumer, the applicant shall:

(1) submit its own water conservation plan before closing on the financial assistance; and

(2) submit the other entity's water conservation plan, if one exists, before closing on the financial assistance; and

(3) require, by contract, that the other entity adopt a water conservation plan that conforms to the board's requirements and submit it to the board. If the requirement is to be included in an existing water or wastewater service contract, it may be included, at the earliest of the renewal or substantial amendment of that contract, or by other appropriate measures.

(e) The board will accept a water conservation plan determined by the commission to satisfy the requirements of 30 TAC Chapter 288 for purposes of meeting the minimum requirements of subsection (b) of this section.

(f) Water conservation plans that are submitted to the TCEQ and copied to the board under Water Code §16.402 must contain the applicable minimum requirements for water conservation plans established by the Commission in its rules at 30 TAC Chapter 288.

(g) Annual reports.

(1) Each entity that is required to submit a water conservation plan to the board or the commission, other than a recipient of financial assistance from the board, shall file a report annually not later than May 1st to the executive administrator on the entity's progress in implementing each of the minimum requirements in the water conservation plan.

(2) Recipients of financial assistance from the board shall maintain an approved water conservation plan in effect until all financial obligations to the state have been discharged and shall file a report with the executive administrator on the applicant's progress in implementing each of the minimum requirements in its water conservation plan and the status of any of its customers' water conservation plans required by contract, within one year after closing on the financial assistance and annually thereafter until all financial obligations to the state have been discharged.

(3) Annual reports prepared for the Commission providing the information required by this subsection may be provided to the board to fulfill the board's reporting requirements.

(h) The following are violations of board rules for purposes of Water Code §16.402:

(1) failure to submit a water conservation plan containing the minimum requirements in subsections (b) and (f) of this section; and

(2) failure to timely submit a complete annual report on the entity's progress in implementing its plan that addresses each element in its water conservation plan, as required by Water Code §16.402 and subsection (g) of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2012.

TRD-201205931
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Effective date: December 5, 2012
Proposal publication date: October 5, 2012
For further information, please call: (512) 463-8061

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.365

The Comptroller of Public Accounts adopts an amendment to §3.365, concerning sales tax holiday--clothing, shoes and school supplies, without changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7265). The amendment makes the following proposed changes.

Subsection (a)(4) is amended for clarity.

Subsection (b)(1)(B) is amended to implement House Bill 1555, 82nd Legislature, 2011; Senate Bill 1, 82nd Legislature, 2011, First Called Session; and legislative intent expressed by Senator Robert L. Duncan and Representative James R. Pitts which together change the dates of the annual three-day sales tax holiday in Tax Code, §151.326 beginning in 2012. House Bill 1555 amended Education Code, §25.0811(a), to provide specific conditions under which a narrow class of campuses within a school district may begin instruction as early as the first Monday in August. Article 33 of Senate Bill 1 amended Tax Code, §151.326, to set the dates of the annual three-day sales tax holiday by using a calculation based on the first date a non-year-round school district may begin classes as provided by Education Code, §25.0811(a). Legislative intent sets the date on the Friday before the eighth day before the earliest district-wide start date and not the earliest date a narrow class of campuses within a school district may begin instruction.

Subsection (c)(3) clarifies that school supplies not purchased during the sales tax holiday for use by elementary or secondary school students are taxable. Subsection (c)(4) and (6) are amended to correct grammatical errors.

Subsection (m) is amended to correct a grammatical error.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.326 and §151.327.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 13, 2012.

TRD-201205887

Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: December 3, 2012
Proposal publication date: September 14, 2012
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §§19.201, 19.208 - 19.210, 19.214, 19.216

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §19.201, Criteria for Licensing; §19.208, Renewal Procedures and Qualifications; §19.209, Exclusion from Licensure; §19.210, Change of Ownership License; §19.214, Criteria for Denying a License or Renewal of a License; and §19.216, License Fees, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification. The amendments to §19.209 and §19.214 are adopted with changes to the proposed text published in the July 6, 2012, issue of the *Texas Register* (37 TexReg 5097). The amendments to §§19.201, 19.208, 19.210, and 19.216 are adopted without changes to the proposed text.

The amendments are adopted to implement Senate Bill (SB) 223 and House Bill (HB) 1720, 82nd Legislature, Regular Session, 2011, and portions of SB 7, 82nd Legislature, First Called Session, 2011. SB 223 and HB 1720 amended Texas Health and Safety Code (THSC) Chapter 242 to require an applicant for a nursing facility license or license holder to disclose its complete compliance history in each state or other jurisdiction in which an institution was operated prior to the application date. The THSC amendment also extends the maximum amount of time DADS may exclude a person from eligibility for a nursing facility license or license renewal from ten years to the person's lifetime or existence. SB 7 amended THSC Chapter 242 to change the length of a nursing facility license from two years to three years. The amendment also authorizes DADS to adopt a system by which nursing facility licenses will expire on staggered dates and renewal fees will be prorated to implement the three-year licensing term.

DADS received written comments from Texas Health Care Association. A summary of the comments and the responses follows.

Comment: The commenter suggested that the current requirements in §19.201(f) should remain the same and only require an applicant for a nursing facility license to provide a five-year compliance history for licensure, as opposed to any time period. The commenter suggested the agency add a provision allowing

the agency to request information outside the five-year period to substantiate a satisfactory compliance history.

Response: The agency disagrees with the comment. THSC §242.032(e) mandates the agency to require an applicant or license holder to file a sworn affidavit of satisfactory compliance history and any other information the agency requires to substantiate a satisfactory compliance history at any time the applicant or licensee and other persons operated an institution. The agency believes that requiring a complete history from each applicant or licensee is necessary to comply with this law. Also, the agency believes that a complete history is necessary to accurately and fully evaluate an applicant or licensee. No changes were made in response to this comment.

Comment: The commenter stated that in §19.201(h)(3) the original five-year requirement regarding facility affiliation for an applicant should remain and the agency should add a provision allowing evaluation of a longer history, if necessary.

Response: The agency disagrees with the comment. THSC §242.032(e) mandates the agency to require an applicant or license holder to file a sworn affidavit of satisfactory compliance history and any other information the agency requires to substantiate a satisfactory compliance history at any time the applicant or licensee and other persons operated an institution. The agency believes that requiring a complete history from each applicant or licensee is necessary to comply with this law. Also, the agency believes that a complete history is necessary to accurately and fully evaluate an applicant or licensee. No changes were made in response to this comment.

Comment: The commenter stated that although the effective date of the law regarding exclusion from licensure limits the new sanctions to a time after September 1, 2011, the proposed amendment should reflect the law prior to and after September 1, 2011.

Response: The agency agrees and made the change to §19.209(a) to clearly reflect the distinction.

Comment: The commenter suggested that the five-year requirement in current §19.214(a)(2)(F) should remain the same. The commenter suggested adding the phrase "for a greater time period if necessary to complete its evaluation" to the end of the sentence.

Response: The agency disagrees with the comment. THSC §242.032(e) mandates the agency to require an applicant or license holder to file a sworn affidavit of satisfactory compliance history and any other information the agency requires to substantiate a satisfactory compliance history at any time the applicant or licensee and other persons operated an institution. The agency believes that requiring a complete history from each applicant or licensee is necessary to comply with this law. Also, the agency believes that a complete history is necessary to accurately and fully evaluate an applicant or licensee. No changes were made in response to this comment.

Comment: The commenter stated that the current five-year review period in §19.214(a)(8) should remain the same with an addition to the rule allowing the agency to review further back if necessary to complete its evaluation. The commenter also suggested adding the phrase "in either a repeated or substantial manner" to the amendment to be consistent with §19.214(a)(4).

Response: The agency disagrees with the comment. THSC §242.032(e) mandates the agency to require an applicant or license holder to file a sworn affidavit of satisfactory compliance history and any other information the agency requires to substantiate a satisfactory compliance history at any time the applicant or licensee and other persons operated an institution. The agency believes that requiring a complete history from each applicant or licensee is necessary to comply with this law. Also, the agency believes that a complete history is necessary to accurately and fully evaluate an applicant or licensee. No changes were made in response to this comment.

Comment: The commenter requested that the agency exercise more discretion for violations in §19.214(b)(1) - (5) and give consideration to successfully completed exclusions or debarments.

Response: The agency agrees in part with the commenter. The agency understands the concern for providing flexibility when determinations are made to grant a license to operate a new facility. The agency modified the proposed rule to allow use of discretion in issuing a license.

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

§19.209. Exclusion from Licensure.

(a) DADS, after providing notice and opportunity for a hearing, may exclude a person from eligibility for a license if the person or any person described in §19.201(e) of this subchapter (relating to Criteria for Licensing) has substantially failed to comply with the rules in this chapter. During the period of exclusion, the excluded person is not eligible to be a license holder or a controlling person of a license holder. The period of exclusion:

(1) must be for at least two years; and

(2) may be:

(A) for no more than ten years if the exclusion is based on conduct that occurred before September 1, 2011; or

(B) throughout the person's lifetime or existence if the exclusion is based on conduct that occurred on or after September 1, 2011.

(b) A license holder or controlling person who operates a nursing facility or an assisted living facility for which a trustee was appointed and for which emergency assistance funds, other than funds to pay the expenses of the trustee, were used is subject to exclusion from eligibility for the:

(1) issuance of an original license for a facility for which the person has not previously held a license; or

(2) renewal of the license of the facility for which the trustee was appointed.

§19.214. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if any person described in §19.201(e) of this subchapter (relating to Criteria for Licensing):

(1) is subject to denial or refusal as described in Chapter 99 of this title (relating to Denial or Refusal of License) during the time frames described in that chapter;

(2) does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DADS at a minimum may consider:

(A) whether any violation resulted in significant harm or a serious and immediate threat to the health, safety, or welfare of any resident;

(B) whether the person promptly investigated the circumstances surrounding any violation and took steps to correct and prevent a recurrence of a violation;

(C) the history of surveys and complaint investigation findings and any resulting enforcement actions;

(D) a repeated failure to comply with regulation;

(E) an inability to attain compliance with cited deficiencies within an acceptable period of time as specified in the plan of correction or credible allegation of compliance, whichever is appropriate;

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(e) of this subchapter has been affiliated with at any time; and

(G) any exculpatory information deemed relevant by DADS;

(3) has committed any act described in §19.2112(a)(2) - (7) of this chapter (relating to Administrative Penalties);

(4) violated Chapter 242 of the Texas Health and Safety Code in either a repeated or substantial manner;

(5) aids, abets, or permits a substantial violation described in paragraph (4) of this subsection about which the person had or should have had knowledge;

(6) fails to provide the required information and facts and/or references;

(7) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §19.216 of this subchapter (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year after the date on which the funds were received by the trustee in accordance with the provisions of §19.2116(e) and (f) of this chapter (relating to Involuntary Appointment of a Trustee); or

(C) franchise taxes;

(8) has a history of any of the following actions at any time preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract canceled under the Medicare or Medicaid program in any state or both;

(B) federal or state nursing facility sanctions or penalties, including, but not limited to, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction or the denial of payment for new Medicaid admissions;

(C) unsatisfied final judgments;

(D) eviction involving any property or space used as a facility in any state;

(E) suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility in any state;

(F) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(G) surrender of a license in lieu of revocation or while a revocation hearing is pending; or

(H) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(9) fails to meet minimum standards of financial condition as described in §19.201(d)(1)(A) of this subchapter and §19.1925(a) of this chapter (relating to Financial Condition); or

(10) fails to notify DADS of a significant adverse change in financial condition as required under §19.1925 of this chapter.

(b) DADS:

(1) denies a license to an applicant to operate a facility if the applicant has on the date of the application:

(A) a debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(B) a court injunction prohibiting the applicant or manager from operating a facility; or

(2) may deny a license to an applicant to operate a new facility if the applicant has a history of any of the following actions at any time preceding the date of the application:

(A) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(B) surrender of a license in lieu of revocation or while a revocation hearing is pending;

(C) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(D) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(E) a court injunction prohibiting the applicant or manager from operating a facility.

(c) Only final actions are considered for purposes of subsections (a)(8) and (b) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(d) If an applicant for a new license owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities. Denial of an application for a new license will not preclude the renewal of licenses for the applicant's other facilities with satisfactory records.

(e) If DADS denies a license or refuses to issue a renewal of a license, the applicant or license holder may request an administrative hearing. Administrative hearings are held under the Health and Human Services Commission's hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act), and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2012.

TRD-201205879
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: December 2, 2012
Proposal publication date: July 6, 2012
For further information, please call: (512) 438-4162

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 12. PUBLIC DONATION AND PARTICIPATION PROGRAM

SUBCHAPTER J. REAL-TIME SYSTEM MANAGEMENT INFORMATION PROGRAM

43 TAC §§12.301 - 12.304

The Texas Department of Transportation (department) adopts new §§12.301 - 12.304, new Subchapter J, all relating to the establishment of a Real-Time System Management Information Program. New §§12.301 - 12.304 are adopted without changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7269) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

A federal rule creating a new Part 511 under Title 23 of the Code of Federal Regulations (23 C.F.R. Part 511), which establishes a real-time system management information program under §1201 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), became effective December 23, 2010. Title 23 C.F.R. Part 511 requires a state to complete development of a program to collect and distribute real-time traffic and travel condition information for Interstate highways not later than November 8, 2014 and for routes of significance in metropolitan areas not later than November 8, 2016 in order for the state to be eligible to receive federal funds for that program. The new sections define the requirements for the development of a Real-Time System Management Information (RTSMI) Program and will allow Texas to comply with federal law, including federal regulations.

New §12.301, Purpose, states that the new rules authorize the RTSMI Program and provides the general reasons for these rules.

New §12.302, Definitions, provides the definitions for terms used within the subchapter. The terms are defined to provide a clear understanding of their usage within the subchapter.

New §12.303, Real-Time System Management Information Program, allows the department to contract for the development of the RTSMI Program and requires any developed system to conform to 23 C.F.R. Part 511 and any traffic control devices installed under the program to conform to the Texas Manual on Uniform Traffic Control Devices (MUTCD). This section requires that the department comply with the applicable federal regulations and allows the flexibility to adjust the program if the federal regulations are amended. Any sign installed under the program must meet the Texas MUTCD requirements, which provides standards on the size, location, and material of signs installed on state right of way.

New §12.304, Program Acknowledgement Plaques, authorizes the department to allow for the installation of program acknowledgement plaques under the program to inform the public that a donation has been made to support the program. The requirements of the section comply with the federal guidelines regarding the size and content of the plaques and the requirement that a plaque installed under the program must comply with state laws prohibiting discrimination. The new section further provides that the department may terminate the authority of the contractor to install an acknowledgement plaque because of safety concerns, interference with the free and safe flow of traffic, or a department determination that a donation under the program is not in the public interest.

COMMENTS

No comments on the proposed new sections were received.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205951
Jeff Graham
General Counsel
Texas Department of Transportation
Effective date: December 6, 2012
Proposal publication date: September 14, 2012
For further information, please call: (512) 463-8683

♦ ♦ ♦

CHAPTER 25. TRAFFIC OPERATIONS

SUBCHAPTER A. GENERAL

43 TAC §25.1

The Texas Department of Transportation (department) adopts an amendment to §25.1, concerning Uniform Traffic Control Devices. The amendment to §25.1 is adopted without changes to the proposed rule text as published, but with changes to the Texas Manual on Uniform Traffic Control Devices, which was proposed for adoption by reference in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7271).

EXPLANATION OF ADOPTED AMENDMENT

Under Transportation Code, §544.001, the Texas Transportation Commission (commission) is required to adopt a manual for a uniform system of traffic control devices. The statute further states that the manual must be consistent with state traffic laws

and to the extent possible conform to the system approved by the American Association of State Highway Transportation Officials. The edition of the manual that is currently in effect is the 2011 version.

The Texas Manual on Uniform Traffic Control Devices (MUTCD) is revised periodically to maintain substantial conformance with the National MUTCD to allow use of a single manual for local, state, and Federal-aid highway projects. The National MUTCD defines the standards used by road managers nationwide to install and maintain traffic control devices on all streets and highways open to public travel. The National MUTCD is published by the Federal Highway Administration (FHWA) under Title 23, Code of Federal Regulations, Part 655, Subpart F.

The department is revising the 2011 Texas MUTCD to incorporate changes to existing compliance dates as adopted by the FHWA, include language restored to the National MUTCD concerning engineering judgment, make the corrections identified by the FHWA in the National MUTCD, and correct minor, non-substantive typographical errors in the 2011 Texas MUTCD.

On May 14, 2012, the FHWA issued a final rule to revise or eliminate certain compliance dates from the National MUTCD as adopted in 2009. The FHWA eliminated the compliance dates for 46 items (eight that had already expired and 38 that had future compliance dates) and extended or revised the dates for four items. These changes became final and effective on June 13, 2012.

The new National MUTCD also restored certain language concerning the use of engineering judgment in the selection and application of traffic control devices that had been originally deleted from the 2009 National MUTCD. This change also became final and effective on June 13, 2012. The Texas MUTCD currently contains provisions for engineering judgment; however, the department has amended the Texas MUTCD to add these provisions under all sections included in the federal changes.

These rule revisions also include minor non-substantive corrections identified by the department and by FHWA in the revisions to the National MUTCD. These changes include such things as corrections to sign designations, grammatical corrections, and correcting formatting and spacing issues. In addition, some sign names have been changed so that the text in the narrative and tables are consistent.

Changes to the Texas MUTCD include corrections identified by the FHWA for the National MUTCD and corrections identified by department staff for the Texas MUTCD.

The adopted 2011 version of the Texas MUTCD and Revision 1 are available online at the department's website, www.txdot.gov. The National MUTCD is available online at www.fhwa.dot.gov.

COMMENTS

Comments regarding the Texas MUTCD update were received from Mr. Mark Olson, P.E., of the Texas Division of the Federal Highway Administration.

Comment: On page TC-4, in the title of Section 2C.35, the sign designation "W8-19aT" is proposed to be added. The designation, however, should be "W8-19aTP."

Response: The department concurs with this comment and will incorporate the correct sign designation.

Comment: On page 49, Table 2B-1 (Sheet 4 of 5) the size of the Right on Red Arrow After Stop (R10-17a) sign should be "30x36" instead of "36x48" in both of the Conventional Road columns. This change was added to the FHWA list of "Known Errors in the 2009 MUTCD" on 9/14/2012.

Response: The department concurs with this comment and will incorporate the correct sign size.

Comment: On page 55, Section 2B.11 the last sentence of Paragraph 01 should be moved to become a new second paragraph, which should be labeled as an "Option" paragraph. The paragraph numbers for existing Paragraphs 02 through 08 should each be increased by one number. This change was added to the FHWA list of "Known Errors in the 2009 MUTCD" on 9/14/2012.

Response: The department concurs with this comment and will incorporate the paragraph format changes.

Comment: On pages 79 and 80, Section 2B.40 in Paragraph 14, the word "to" should be added between the words "used" and "notify" in both sentences. This change was added to the FHWA list of "Known Errors in the 2009 MUTCD" on 9/14/2012.

Response: The department concurs with this comment and will correct the grammatical error.

Comment: On page 109, Table 2C-2 (Sheet 3 of 3) the size of the W16-2aP (XX ft. plaque) in the Oversized column should be changed from 30x18 to 30x12. This will result in the plaque being the same size as the W16-3aP (XX MILES plaque).

Response: The department concurs with this comment and will incorporate the correct sign size.

Comment: On page 194, Table 2E-4T when specifying the minimum font size, the style is also specified (e.g., "CV 5WR"). These abbreviations are not defined in the manual and none of the other sign size tables throughout the manual contain the font style. The font style should, therefore, be removed from the table.

Response: The department concurs with this comment and will remove the font styles.

Comment: On page 299, Section 2G.16 reviewing the toll road signing policy previously developed by the department, the definition of Express Lanes in Paragraph 05, Bullet B appears to be incorrect. The words "at a discounted toll or" should be deleted in the second line. Without this change, the definition is the same as a Toll Lane.

Response: The department concurs with this comment and will incorporate the revised language.

Comment: On pages 304, 307, and 311, Figures 2G-18, 2G-21TA, and 2G-24TA, the three figures were initially modified from the 2009 National MUTCD to show additional examples of managed lane facility signing. However, in order to be consistent with toll facility signing, the advance guide signs for entrances to the facility should contain the word "ENTRANCE" on each of the signs.

Response: The department concurs with this comment and will correct the sign legends in the three figures.

Comment: On page 520, Section 4E.06 the Paragraph 08 stops mid-sentence. The following words from the National MUTCD should be added to the end of the last sentence "walking speed or actual clearance of the crosswalk."

Response: The department concurs with this comment and will correct the error by adding the additional language.

Comment: On page 574, Section 6C.04, Paragraph 02 is proposed to be changed from a guidance statement to a standard statement. This results in Paragraphs 01 and 02 both being standard statements that are worded very similar. Suggest the two paragraphs be combined into one sentence or at least one paragraph. The remaining paragraphs in the section would then need to be renumbered.

Response: The department concurs with this comment and will combine the two paragraphs into one. The resulting wording will be the same as the language in Section 6G.03, Paragraph 03.

Comment: On page 601, Table 6F-1 (Sheet 2 of 4) the CW16-2aP (XXX FT) plaque is not shown in the table. It should be included with sizes the same as the CW16-3aP (X MILES) plaque.

Response: The department concurs with this comment and will incorporate the sign into the table.

Comment: On page 602, Table 6F-1 (Sheet 3 of 4) in the Section column, the reference for the Slow Moving Vehicle (CW21-4) sign is proposed to be changed from "6G.06" to "6F.36". The original reference, however, is correct and the proposed change is not needed. The Trucks Entering Roadway (CW27-1T) sign is not shown in the table and should be included with a standard size of 48x48 and a reference to Section 6F.36. In addition, the two versions of the Work Convoy (CW21-10aT and CW21-10bT) and X Vehicle Convoy (CW21-10cT and CW21-10dT) signs are proposed to be separated into two rows due to their distinctly different designs. FHWA suggested further clarification to the Sign or Plaque column by adding "(diamond)" for the CW21-10T, "(2-line)" for the CW21-10cT, and "(3-line)" for the CW21-10dT.

Response: The department concurs with these comments and will refrain from making the reference change for the CW21-4 sign, add the CW27-1T sign to the table, and clarify the Work Convoy sign descriptions in the table.

Comment: To comply with the National MUTCD, Section 6F.66, Vertical Panels, paragraphs 2 and 3 should read "Where the height of the retroreflective material on the vertical panel is 36 inches or more, a stripe width of 6 inches shall be used. Option: Where the height of the retroreflective material on the vertical panel is less than 36 inches, a stripe width of 4 inches may be used."

Response: The department concurs with this comment and will incorporate the language from paragraphs 2 and 3 of Section 6F.66 from the National MUTCD.

STATUTORY AUTHORITY

The amendment is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §544.001, which requires the commission to adopt a manual of uniform traffic control devices.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 544.

§25.1. Uniform Traffic Control Devices.

(a) The 2011 Texas Manual on Uniform Traffic Control Devices, Revision 1, was prepared by the Texas Department of Transportation to govern standards and specifications for all traffic control devices to be erected and maintained upon any street, highway, bikeway, public facility, or private property open to public travel within this state, including those under local jurisdiction, and is adopted by reference. Copies of the manual are available online through the Texas Department of Transportation web site, www.txdot.gov, and a copy is available for public inspection at the department's Traffic Operations Division office located at 118 East Riverside Drive, Austin, Texas.

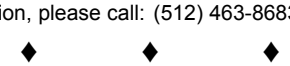
(b) This manual will be periodically updated. In the intervals between updates, standards contained in "Official Rulings on Requests for Interpretations, Changes, and Experimentation" to the United States Department of Transportation's Manual on Uniform Traffic Control Devices for Streets and Highways will be inserted in this manual and may be used as interim standards.

(c) This manual is not intended to preclude the use of sound engineering judgment and experience in the application and installation of devices and particularly in those cases not specifically covered which must not conflict with the manual or other applicable state laws.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 16, 2012.

TRD-201205952
Jeff Graham
General Counsel
Texas Department of Transportation
Effective date: December 6, 2012
Proposal publication date: September 14, 2012
For further information, please call: (512) 463-8683



TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 22 TAC §153.24(k)

Penalty Matrix

Nature of Violation(s)	Range of Recommended Actions
1st occurrence - violation(s) of the Act, Rules, or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply	First-time violator letter with acknowledgement of violation or administrative penalty of $100 to $500 per violation, or both
1st occurrence - violation(s) of the Act, Rules, or USPAP that, individually or collectively, constitute evidence of a serious but remediable deficiency	First-time violator letter with agreement to take remedial course work, first-time violator letter with agreement to adopt preventive policies and procedures, or administrative penalty of $250 to $1,000 per violation, or any combination thereof
1st occurrence - violation(s) of the Act, Rules, or USPAP that, individually or collectively, was done willfully or in a grossly negligent manner	Suspension or revocation and an administrative penalty of $500 to $1,500 per violation
2nd occurrence - violation(s) of the Act, Rules, or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply	Administrative penalty of $500 to $1,500 per violation with requirement to take remedial course work or to adopt preventive policies and procedures, or both
2nd occurrence - violation(s) of the Act, Rules, or USPAP that, individually or collectively, constitute evidence of a serious but remediable deficiency	Administrative penalty of $500 to $1,500 per violation plus requirement to take remedial in-class course work and to adopt preventive policies and procedures
2nd occurrence - violation(s) of the Act, Rules, or USPAP that, individually or collectively, were done willfully or in a grossly negligent manner	Revocation and administrative penalty of $1,500 per violation
3rd occurrence - violation(s) of the Act, Rules, or USPAP that do not, individually or collectively, constitute evidence of a serious inability or unwillingness to comply	Administrative penalty of $1,000 to $1,500 per violation with requirement to take remedial in-class course work or to adopt preventive policies and procedures, or both
3rd occurrence - violation(s) of the Act, Rules, or USPAP that, individually or collectively, constitute evidence of a serious but remediable deficiency	Administrative penalty of $1,500 per violation, or revocation or suspension for up to 180 days with requirement to take remedial in-class course work and to adopt preventive policies and procedures, or both
Unlicensed activity	Administrative penalty of $1,500 to $5,000

Figure: 25 TAC §200.7(a)

Table 1. HAI and PAE Data Verification Deadlines

Reporting Quarter	January 1-March 31	April 1-June 30	July 1-September 30	October 1-December 31
Facility Data Submission	As set forth in NHSN or its successor			
Departmental Data Reconciliation	June 1	September 1	December 1	March 1
Facility Correction	June 30	September 30	December 31	March 31
Departmental Data Summary	NA	October 15	NA	April 15
Facility Comment Period	NA	October 30	NA	April 30
Departmental Review of Comments	NA	November 15	NA	May 15
Posting of Summary	NA	December 1	NA	June 1

* Reporting deadline for infections related to implant procedures are the same dates but in the calendar year following the procedure.

Figure: 30 TAC §101.104(c)(1)

$$\text{FeeEquivBalance} = \text{FeeEquivAcct} - \text{AreaObligation}$$

Definitions:

AreaObligation = The Area §185 Obligation calculated under subsection (c) of this section representing the sum of the §185 Fee Obligations from all major stationary sources in the Houston-Galveston-Brazoria nonattainment area for the calendar year being assessed.

FeeEquivAcct = Amount of Equivalency Credits in the Fee Equivalency Account as determined under §101.102 of this title (relating to Equivalent Alternative Fee). This amount may contain any equivalency surplus from previous year's assessments.

FeeEquivBalance = The amount in the Fee Equivalency Account Balance after the Area §185 Obligation is met in a calendar year.

Figure: 30 TAC §101.104(c)(3)

$$\text{ProratedFee} = \left(\frac{\text{FeeEquivBalance}}{\text{AreaObligation}}\right) \text{§185Fee}$$

Definitions:

§185Fee = The fee obligation for each major stationary source or Section 185 Account calculated by the executive director based on actual emissions reported in the inventory under §101.10 of this title (relating to Emissions Inventory Requirements).

AreaObligation = The Area §185 Obligation calculated under this subsection for the Houston-Galveston-Brazoria one-hour ozone standard nonattainment area for the calendar year being assessed.

FeeEquivalencyBalance = The amount in the Fee Equivalency Account Balance after the §185 Obligation is met in a calendar year.

ProratedFee = The reduced fee each major stationary source or Section 185 Account will be assessed if insufficient equivalency credits are allocated in the Fee Equivalency Account.

Figure: 30 TAC §101.113(d)(3)

$$§185Fee = \$5000\left[\left(\frac{2}{3} * \frac{CPIx}{122.15}\right) + \left(\frac{1}{3} * \frac{CPIy}{122.15}\right)\right] * (Actual - 0.8 * BA)$$

Definitions:

122.15 = Average consumer price index for Fiscal Year 1989 (as published by the United States Bureau of Labor Statistics, Consumer Price Index (CPI) - All Urban Consumers, Not Seasonally Adjusted, base period 1982 - 84 = 100).

§185Fee = The fee amount due annually to the commission based on actual volatile organic compound (VOC), nitrogen oxide (NO_X) emissions, or both.

Actual = All quantifiable emissions of VOC, NO_X from the major stationary source or Section 185 Account; or if VOC is aggregated with NO_X, both VOC and NO_X together, reported in the annual emissions inventory including emissions from emissions events in units of tons for the regulated entities combined under §101.107 of this title (relating to Aggregated Baseline Amount), for the year being assessed.

BA = Baseline amount in tons per year from Section 185 Account as calculated under this subchapter.

CPIx = The average of the CPI for the 12 months that includes the fiscal year for the calendar year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982-84=100). This value represents the January through August portion of the annual CPI.

CPIy = The average of the CPI for the 12 months that includes the fiscal year following the calendar year that a fee is being assessed (as published by the United States Bureau of Labor Statistics, CPI - All Urban Consumers, Not Seasonally Adjusted, base period 1982-84=100). This value represents the September through December portion of the annual CPI.

Figure: 34 TAC §3.27(c)

Gross sales values	$20,000.00
Transportation and processing	(5,000.00)
Wellhead value	$15,000.00
Royalty payment	(2,500.00)
Net value to working interest	$12,500.00
Tax rate	.075
Tax due	$937.50

Figure: 34 TAC §3.28(e)

Tax Due for June 1985	$10,000	$10,000	$10,000	$10,000
Reasonable Estimate for July 1985	$10,000	$10,000	$10,000	$10,000
Estimate Payment Remitted for July	$10,000	$8,000	$8,000	$0
Actual Tax Due for July	$12,000	$8,000	$12,000	$12,000
Amount Delinquent	$0	$0	$2,000	$10,000
Penalty on Delinquent Amount	$0	$0	$200	$1,000
Additional Tax Due with July report	$2,000	$0	$4,000	$12,000

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Employees Retirement System of Texas

Request for Proposal to Conduct a Compliance Review of the Third-Party Administrator of the Deferred Compensation Texa$aver Program

In accordance with Texas Government Code §609.509, the Board is authorized to contract for the necessary goods and consolidated billing, accounting, and other services provided with a deferred compensation plan and to periodically conduct a compliance review of the third-party administrator ("TPA"). The Employees Retirement System of Texas ("ERS") is issuing a Request for Proposals ("RFP") for qualified auditing firms ("Auditor") to Conduct a Compliance Review of the TPA of the Deferred Compensation Texa$aver Program ("Program"), with an initial term beginning September 1, 2013, through December 31, 2016. The Auditor shall provide the level of benefits required in the RFP and meet other requirements that are in the best interest of ERS, the GBP, its Participants ("Participants") and the state of Texas, and shall be required to execute a Contractual Agreement ("Contract") provided by, and satisfactory to, ERS.

An Auditor wishing to respond to this RFP shall: (a) maintain its principal place of business and provide all services within the United States of America, and shall have a current valid Certificate of Authority and/or current license to do business as an Auditor in the state of Texas from the Secretary of State; (b) have documented experience of providing compliance review services with deferred compensation plans, one of which will have an enrollment of 25,000 Participants working in multiple locations for a minimum of three (3) years; (c) have a current net worth of $250,000 as demonstrated by an audited financial statement as of the close of the Auditor's most recent fiscal year; and (d) have extensive knowledge of the applicable IRC regulations including 401(a), 401(k) and 457.

The RFP will be available on or after December 6, 2012, from ERS' website and will include documents for Auditor's review and response. To access the secured portion of the RFP website, an interested Auditor shall email its request to the attention of iVendor Mailbox at: ivendorquestions@ers.state.tx.us. The email request shall reflect: (a) Auditor's legal name; (b) point of contact's full name; (c) point of contact's physical address; (d) point of contact's phone and fax numbers; and (e) point of contact's email address.

Upon receipt of this information a user ID and password will be issued to the requesting organization that will permit access to the secured RFP.

General questions concerning the RFP and/or ancillary bid materials should be sent to the iVendor Mailbox where the responses, if applicable, are updated frequently. Submission deadline for all RFP questions submitted to the iVendor Mailbox are due on December 21, 2012, at 4:00 p.m. CT.

To be eligible for consideration the Auditor is required to submit a total of six (6) sets of the Proposal in a sealed container. One (1) printed original shall be labeled as an "Original" and include fully executed documents, as appropriate, signed in blue ink and without amendment or revision. Three (3) additional printed copies labeled "copy" of the Proposal, including all required exhibits, shall be provided in printed format. Finally, two (2) complete copies of the entire Response shall be submitted on CD-ROMs in Excel or Word format. No PDF documents (with the exception of financial statements and audited financial materials) may be reflected on the CD-ROMs. All materials shall be received by ERS no later than 12:00 Noon (CT) on January 10, 2013.

ERS will base its evaluation and selection of an Auditor on factors including, but not limited to, the following which are not necessarily listed in order of priority: compliance with and adherence to the RFP, minimum and preferred requirements as specified, fee proposal and other relevant criteria. Each Proposal will be evaluated both individually and relative to the Proposal of other qualified Auditors. Complete specifications will be included with the RFP.

ERS reserves the right to reject any and/or all Proposals and/or call for new Proposals if deemed by ERS to be in the best interests of ERS, the Program, its Participants and the state of Texas. ERS also reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or in connection with the preparation thereof. ERS reserves the right to vary all provisions set forth at any time prior to execution of a Contract where ERS deems it to be in the best interest of ERS, the Program, its Participants and the state of Texas.

TRD-201205928
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: November 15, 2012

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is January 7, 2013. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on January 7, 2013. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: AKZO Nobel Paints LLC; DOCKET NUMBER: 2012-2031-WQ-E; IDENTIFIER: RN100611524; LOCATION: Temple, Bell County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Multi-Sector General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: Avalon Investments, LLC dba Bunnys; DOCKET NUMBER: 2012-1479-PST-E; IDENTIFIER: RN102051331; LOCATION: Tyler, Smith County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.72(3), by failing to report a suspected release to the TCEQ within 24 hours after a failed automatic tank gauge (ATG) test on February 4, 2012; and 30 TAC §334.74, by failing to immediately investigate a suspected release of a regulated substance after a failed ATG test on February 4, 2012; PENALTY: $33,850; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(3) COMPANY: B K SINGH ENTERPRISES, INCORPORATED dba New Quick N Easy; DOCKET NUMBER: 2012-1740-PST-E; IDENTIFIER: RN102358603; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,000; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2570; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: CAMP LONGHORN CAPITAL, INCORPORATED; DOCKET NUMBER: 2012-1710-MWD-E; IDENTIFIER: RN102078664; LOCATION: Burnet, Burnet County; TYPE OF FACILITY: camp site with a wastewater treatment plant; RULE VIOLATED: TCEQ Permit Number WQ0013459001, Special Provision Number 6 and 30 TAC §305.125(1), by failing to provide equipment to determine application rates and to maintain accurate records of the volume of effluent applied to the irrigation field; 30 TAC §30.350(d) and TCEQ Permit Number WQ0013459001, Operational Requirements Number 9, by failing to employ or contract a Class D or higher licensed wastewater treatment operator; and TCEQ Permit Number WQ0013459001, Effluent Limitations and Monitoring Requirements B and 30 TAC §319.7(c), by failing to make readily available for review the pH monitoring results for the month of June 2012; PENALTY: $4,470; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(5) COMPANY: CHAMPION PET FOODS, INCORPORATED; DOCKET NUMBER: 2012-1603-AIR-E; IDENTIFIER: RN104603956; LOCATION: Waco, McLennan County; TYPE OF FACILITY: pet food processing plant; RULE VIOLATED: 30 TAC §101.4 and Texas Health and Safety Code, §382.085(a) and (b), by failing to prevent nuisance odor conditions; PENALTY: $4,125; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Chil L. Baldridge dba YCS Market; DOCKET NUMBER: 2012-1517-PST-E; IDENTIFIER: RN102019809; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II vapor space manifolding and dynamic back pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; PENALTY: $10,275; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Chong Duve dba Duves Quick Stop; DOCKET NUMBER: 2012-1426-PST-E; IDENTIFIER: RN102266129; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,825; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2570; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: City of Borger; DOCKET NUMBER: 2012-1633-MWD-E; IDENTIFIER: RN102328499; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System Permit Number WQ0010535001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $16,600; ENFORCEMENT COORDINATOR: Remington Burklund, (512) 239-2611; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(9) COMPANY: City of Josephine; DOCKET NUMBER: 2012-0872-MWD-E; IDENTIFIER: RN101916310; LOCATION: Josephine, Collin County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010887001, Effluent Limitations and Monitoring Requirements Numbers 1, 3 and 6, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010887001, Sludge Provisions, by failing to timely submit the annual sludge report by September 1, 2010, for the monitoring period ending July 31, 2010; 30 TAC §305.125(1) and (9)(A) and TPDES Permit Number WQ0010887001, Monitoring and Reporting Requirements Number 7(c), by failing to report any effluent violation which deviates from the permitted limitation by more than 40% in writing to the Regional Office and the Enforcement Division within five working days of becoming aware of the non-compliance; and 30 TAC §§305.125(1) and (11)(A), 319.4 and 319.5(b), and TPDES Permit Number WQ0010887001, Effluent Limitations and Monitoring Requirements Number 1 and Other Requirements Number 4, by failing to analyze monthly samples at the minimum frequency specified in the permit; PENALTY: $49,395; ENFORCEMENT COORDINATOR:

Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: City of Shepherd; DOCKET NUMBER: 2012-1511-MWD-E; IDENTIFIER: RN101916666; LOCATION: Shepherd, San Jacinto County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0011380001, Final Effluent Limitations and Monitoring Requirements Numbers 1 and 6, by failing to comply with permitted effluent limits; PENALTY: $6,563; ENFORCEMENT COORDINATOR: Nick Nevid, (512) 239-2612; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(11) COMPANY: City of Stamford; DOCKET NUMBER: 2012-1521-PWS-E; IDENTIFIER: RN101392165; LOCATION: Stamford, Jones County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(B) and §290.110(b)(4) and Texas Health and Safety Code, §341.0315(c), by failing to maintain a disinfectant residual concentration of at least 0.5 milligrams per liter total chlorine in the water throughout the distribution system; PENALTY: $160; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2565; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(12) COMPANY: City of Stephenville; DOCKET NUMBER: 2012-1925-WQ-E; IDENTIFIER: RN102081049; LOCATION: Stephenville, Erath County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Multi-Sector General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: City of Zavalla; DOCKET NUMBER: 2012-1752-PWS-E; IDENTIFIER: RN101386100; LOCATION: Zavalla, Angelina County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(b)(1) and (f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; PENALTY: $178; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: Clifford & Clyde Kitten, L.P. dba South Garza Water Supply Corporation; DOCKET NUMBER: 2012-1366-PWS-E; IDENTIFIER: RN104192109; LOCATION: Justiceburg, Garza County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; PENALTY: $504; ENFORCEMENT COORDINATOR: Andrea Linson, (512) 239-1482; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(15) COMPANY: COMMUNITY UTILITY COMPANY; DOCKET NUMBER: 2012-1193-MLM-E; IDENTIFIER: RN101198554; LOCATION: Huffman, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(C)(ii) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide a total storage capacity of 200 gallons per connection; 30 TAC §290.39(j)(1)(A) and THSC, §341.035, by failing to notify the commission prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production, treatment, storage, or pressure maintenance capacity; 30 TAC §290.46(n)(2), by failing to develop, maintain, and make available for commission review an up-to-date map of the distribution system so that valves and mains may be easily located during emergencies; 30 TAC §290.42(l), by failing to compile, maintain, and make available for commission review an accurate and up-to-date plant operations manual for operator review and reference; 30 TAC §290.121(a) and (b), by failing to develop, maintain and make available for commission review an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter once every three years; 30 TAC §290.46(m)(1)(B), by failing to conduct an annual inspection of the facility's pressure tank; 30 TAC §290.41(c)(3)(O), by failing to enclose the well with an intruder-resistant fence; 30 TAC §290.42(e)(5), by failing to house the hypochlorination solution container and pump in a secure enclosure to protect them from adverse weather conditions and vandalism; 30 TAC §290.45(b)(1)(C)(iii) and THSC, §341.0315(c), by failing to provide two or more service pumps having a total capacity of 2.0 gallon per minute (gpm) per connection; 30 TAC §290.45(b)(1)(A)(i) and THSC, §341.0315(c), by failing to provide a well capacity of 1.5 gpm per connection; 30 TAC §288.20(a) and §288.30(5)(B), by failing to adopt a Drought Contingency Plan that includes all elements for municipal use by a retail public water supplier; 30 TAC §290.106(e), by failing to provide the results of annual nitrate sampling to the executive director; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.107(e), by failing to provide the results of annual volatile organic contaminants sampling to the executive director; 30 TAC §290.106(e), by failing to provide the results of triennial mineral sampling to the executive director; 30 TAC §290.113(e), by failing to provide the results of Stage 1 Disinfectant Byproduct sampling to the executive director; 30 TAC §290.107(e), by failing to provide the results of the triennial synthetic organic contaminants sampling to the executive director; and 30 TAC §290.108(e), by failing to provide the results of triennial radionuclide sampling to the executive director; PENALTY: $6,738; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Deer Park Independent School District; DOCKET NUMBER: 2012-2098-PST-E; IDENTIFIER: RN100670249; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: school district; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Devon Gas Services, L.P.; DOCKET NUMBER: 2012-1068-AIR-E; IDENTIFIER: RN102913225; LOCATION: Decatur, Wise County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §113.1090 and §122.143(4), 40 Code of Federal Regulations (CFR) §63.6615 and §63.6610(a), Federal Operating Permit (FOP) Number O-2495/Oil and Gas General Operating Permit Number 514, Site-wide Requirements (b)(21), and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct required initial testing for compliance with federal reciprocating internal combustion engines (RICE) Maximum Achievable Control Technology (MACT) requirements and by failing to conduct subsequent semi-annual compliance testing; 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-2495/Oil and Gas General Operating

Permit Number 514, Site-wide Requirements (b)(1) and (2), and THSC, §382.085(b), by failing to report all instances of deviations; 30 TAC §122.143(4) and §122.146(2), FOP Number O-2495/Oil and Gas General Operating Permit Number 514, Site-wide Requirements (b)(1) and (2), and THSC, §382.085(b), by failing to submit a permit compliance certification within 30 days after the end of the certification period; 30 TAC §113.1090, 40 CFR §63.6625(a)(2), and THSC, §382.085(b), by failing to monitor continuous catalyst inlet temperature as required by MACT standards; and 30 TAC §113.1090 and §122.143(4), 40 CFR §63.6630(c) and §66.6650(b), FOP Number O-2495/Oil and Gas General Operating Permit Number 514, Site-wide Requirements (b)(21), and THSC, §382.085(b), by failing to submit an initial compliance notification for MACT RICE applicable engines; PENALTY: $47,178; ENFORCEMENT COORDINATOR: Linda Ndoping, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: East Texas Medical Center; DOCKET NUMBER: 2012-1707-PST-E; IDENTIFIER: RN102227089; LOCATION: Tyler, Smith County; TYPE OF FACILITY: property with an emergency generator and one underground storage tank (UST); RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the product piping associated with the UST; PENALTY: $3,750; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(19) COMPANY: Effective Environmental, Incorporated; DOCKET NUMBER: 2012-1086-IHW-E; IDENTIFIER: RN102993672; LOCATION: Balch Springs, Dallas County; TYPE OF FACILITY: hazardous and nonhazardous waste transporter and transfer station; RULE VIOLATED: 30 TAC §335.2(b), by failing to prevent the disposal of industrial hazardous waste at an unauthorized facility; PENALTY: $3,450; Supplemental Environmental Project offset amount of $1,380 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Household Hazardous Waste Clean-up; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Georgia-Pacific Wood Products South LLC dba Camden Plywood & Lumber Complex; DOCKET NUMBER: 2012-1312-PWS-E; IDENTIFIER: RN101286227; LOCATION: Camden, Polk County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(1)(A), by failing to collect routine distribution coliform samples at active service connections which are representative of water quality throughout the distribution system; 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to maintain a minimum disinfectant residual of 0.2 milligrams per liter free chlorine in each ground storage tank and throughout the distribution system at all times; 30 TAC §290.46(k), by failing to obtain approval from the executive director for an interconnection; and 30 TAC §290.46(e)(4)(A) and THSC, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a Class D or higher license; PENALTY: $1,105; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(21) COMPANY: Ghulam Food Enterprises, Incorporated dba Grab A Snack; DOCKET NUMBER: 2012-1537-PST-E; IDENTIFIER: RN103021358; LOCATION: Tyler, Smith County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,750; ENFORCEMENT COORDINATOR: Sarah Davis, (512) 239-1653; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(22) COMPANY: Harris County; DOCKET NUMBER: 2012-1536-PST-E; IDENTIFIER: RN102254810; LOCATION: Hockley, Harris County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $1,875; Supplemental Environmental Project offset amount of $1,500 applied to Bayou Land Conservancy fka Legacy Land Trust - Spring Creek Greenway Project; ENFORCEMENT COORDINATOR: Sarah Davis, (512) 239-1653; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Harris County Municipal Utility District 480; DOCKET NUMBER: 2012-1425-MWD-E; IDENTIFIER: RN104566617; LOCATION: Tomball, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(17) and §319.7(d) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014606001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and TWC, §26.121(a), and TPDES Permit Number WQ0014606001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $5,250; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: HH & BAR INVESTMENTS, INCORPORATED dba Pic-N-Sav; DOCKET NUMBER: 2012-1717-PST-E; IDENTIFIER: RN101897080; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,350; ENFORCEMENT COORDINATOR: Andrea Park, (713) 422-8970; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: Hilliard, Brian D.; DOCKET NUMBER: 2012-2046-WOC-E; IDENTIFIER: RN103452512; LOCATION: Dodd City, Fannin County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $175; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: Hub City Convenience Stores, Incorporated dba Fast Stop 9; DOCKET NUMBER: 2012-1572-PST-E; IDENTIFIER: RN102046794; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Joel McAlister, (512) 239-2619; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(27) COMPANY: HUDSON WATER SUPPLY CORPORATION; DOCKET NUMBER: 2012-1763-PWS-E; IDENTIFIER: RN101455954; LOCATION: Lufkin, Angelina County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(4)(B) and §290.122(c)(2)(A), by failing to collect raw

groundwater source *escherichia coli* samples from all sources within 24 hours of being notified of a distribution total coliform-positive result and by failing to provide public notification of the failure to collect raw groundwater source *escherichia coli* samples; and 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes; PENALTY: $1,216; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(28) COMPANY: HUNTER ROAD INVESTMENTS LLC dba Blue Agave Mobile Home Park; DOCKET NUMBER: 2012-1675-PWS-E; IDENTIFIER: RN101272581; LOCATION: San Marcos, Hays County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.43(c)(6), by failing to maintain all treatment units, storage and pressure maintenance facilities, distribution system lines and related appurtenances in a watertight condition; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter once every three years; 30 TAC §290.45(b)(1)(C)(i) and Texas Health and Safety Code, §341.0315(c), by failing to provide a minimum well capacity of 0.6 gallons per minute per connection; 30 TAC §290.46(r), by failing to operate the facility to maintain a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; 30 TAC §290.41(c)(1)(F) and TCEQ AO Docket Number 2009-2008-PWS-E, Ordering Provision 2.d.i., by failing to secure a sanitary control easement covering all property within 150 feet of the facility's well; and 30 TAC §290.46(f)(2), (3)(A)(ii)(III), and (D)(ii), by failing to provide facility records to commission personnel at the time of the investigation; PENALTY: $405; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(29) COMPANY: James Triplett and Marvin Triplett dba Triplett Waste Service; DOCKET NUMBER: 2012-1323-MSW-E; IDENTIFIER: RN106320864; LOCATION: Balch Springs, Dallas County; TYPE OF FACILITY: construction and demolition debris transporter business; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent unauthorized disposal of municipal solid waste; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: Johnson, Leonard M.; DOCKET NUMBER: 2012-2005-WOC-E; IDENTIFIER: RN103641353; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $175; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: Jose Luis Perez; DOCKET NUMBER: 2012-1431-MLM-E; IDENTIFIER: RN106264948; LOCATION: Falfurrias, Brooks County; TYPE OF FACILITY: recycling; RULE VIOLATED: 30 TAC §328.5(f), by failing to maintain recycling records and making them immediately available for inspection upon request by agency personnel; and 30 TAC §324.15, Texas Health and Safety Code, §371.041 and 40 Code of Federal Regulations §279.22(d), by failing to perform response action upon detection of a release of used oil; PENALTY: $1,574; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(32) COMPANY: Khawar & Sons, Incorporated dba Zeeshon C Store; DOCKET NUMBER: 2012-1089-PST-E; IDENTIFIER: RN101783710; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail gasoline sales; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the piping associated with the underground storage tank system; PENALTY: $2,634; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(33) COMPANY: KHBM PARTNERS II LTD; DOCKET NUMBER: 2012-2038-WQ-E; IDENTIFIER: RN106364656; LOCATION: Conroe, Montgomery County; TYPE OF FACILITY: land development; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(34) COMPANY: KULSOOM BANO, INCORPORATED dba Get N Go; DOCKET NUMBER: 2012-1523-PST-E; IDENTIFIER: RN101563690; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $1,625; ENFORCEMENT COORDINATOR: Joel McAlister, (512) 239-2619; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(35) COMPANY: Lama Enterprises, Incorporated dba L & M Superette 1; DOCKET NUMBER: 2012-1666-PST-E; IDENTIFIER: RN102015138; LOCATION: Kingsville, Kleberg County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,813; ENFORCEMENT COORDINATOR: Jessica Schildwachter, (512) 239-2617; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(36) COMPANY: N & S Investments, Incorporated dba Sonik Food Mart; DOCKET NUMBER: 2012-1504-PST-E; IDENTIFIER: RN102351699; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and TWC, §26.3467(a), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $2,141; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2570; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(37) COMPANY: NATIONAL ELECTRIC COIL COMPANY, L.P.; DOCKET NUMBER: 2012-1202-MLM-E; IDENTIFIER: RN100617448; LOCATION: Brownsville, Cameron County; TYPE OF FACILITY: engine and motor manufacturing; RULE VIOLATED: 30 TAC §335.69(a)(2) and 40 Code of Federal Regulations (CFR) §262.34(a)(2), by failing to have a beginning accumulation date on each container storing hazardous waste; 30 TAC §335.112(a)(3) and §335.69(a)(4)(A) and 40 CFR §262.34(a)(4) and §265.52(d), (e) and (f), by failing to maintain an adequate contingency plan; 30 TAC §335.112(a)(1) and §335.69(a)(4)(A) and 40 CFR §262.34(a)(4) and §265.16(c) and (d)(3), by failing to provide annual review training to the plant personnel in the handling of hazardous waste materials; 30 TAC §335.6(c), by failing to update the plant's Notice of Registration;

30 TAC §335.13(k) and 40 CFR §262.42(a)(2), by failing to submit an exception report for not receiving a copy of a manifest with the handwritten signature of the owner or operator of the designated facility within 45 days of the date the waste was accepted by the initial transporter; 30 TAC §116.115(b)(2)(E)(i) and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain a copy of the permit at the plant; 30 TAC §116.115(c) and New Source Review Permit (NSRP) Number 20956, Special Condition (SC) Number 2, and THSC, §382.085(b), by failing to mark the location of all permitted sources in a conspicuous location to correspond with identification on the plot plan and maximum allowable emission rate tables; and 30 TAC §116.115(c), and NSRP Number 20956, SC Numbers 11.B. and 11.C., and THSC, §382.085(b), by failing to maintain information and data to demonstrate continuous compliance with the restricted hours of operation; PENALTY: $20,104; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(38) COMPANY: NATURAL WASTE SOLUTIONS, INCORPORATED dba Natures Way Resources Conroe; DOCKET NUMBER: 2012-1184-MSW-E; IDENTIFIER: RN104208210; LOCATION: Conroe, Montgomery County; TYPE OF FACILITY: composting; RULE VIOLATED: 30 TAC §§328.4(b)(3), 328.5(f)(1) and 332.23(5), by failing to provide recycling records and making them immediately available for inspection upon request by agency personnel; 30 TAC §328.5(f)(2)(B) and §332.23(5), by failing to maintain records to demonstrate training of staff in the inspection of incoming loads to ensure that they contain no more than 10% incidental non-recyclable waste; and 30 TAC §§37.921 and 328.5(c)(2)(A), (d), (f)(3), and 332.23(5), by failing to provide adequate financial assurance for the closure of a recycling facility; PENALTY: $7,469; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: Nick Patel dba Beltway Express; DOCKET NUMBER: 2012-1163-PST-E; IDENTIFIER: RN102791266; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a delivery certificate by submitting a properly completed underground storage tank (UST) registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $5,640; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(40) COMPANY: RAM DOOT ENTERPRISES, INCORPORATED dba One Stop Store; DOCKET NUMBER: 2012-1471-PST-E; IDENTIFIER: RN102232519; LOCATION: Plano, Collin County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring); PENALTY: $3,375; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2570; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(41) COMPANY: Randolph Field Independent School District; DOCKET NUMBER: 2012-1477-PST-E; IDENTIFIER: RN101855070; LOCATION: Universal City, Bexar County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; 30 TAC §334.50(b)(2) and TWC, §26.3475(b), by failing to provide release detection for the suction piping associated with the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $5,689; ENFORCEMENT COORDINATOR: Joel McAlister, (512) 239-2619; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(42) COMPANY: Ricky W I Kirby; DOCKET NUMBER: 2012-2035-OSI-E; IDENTIFIER: RN104101837; LOCATION: Trenton, Fannin County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §285.61(4), by failing, as an installer, to ensure that an authorization to construct has been issued prior to beginning construction of an On-site Sewage Facility; PENALTY: $175; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(43) COMPANY: S.V. Texas Cooler, LLC dba Texas Cooler; DOCKET NUMBER: 2012-1593-PST-E; IDENTIFIER: RN103146619; LOCATION: Stockdale, Wilson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring period); PENALTY: $15,000; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(44) COMPANY: Shahab, Incorporated dba Cowboys 11; DOCKET NUMBER: 2012-1402-PST-E; IDENTIFIER: RN102354206; LOCATION: Granbury, Hood County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $9,247; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(45) COMPANY: SIRAJ TRADERS, USA, INCORPORATED dba Shop N Go 3; DOCKET NUMBER: 2012-1422-PST-E; IDENTIFIER: RN101883833; LOCATION: Conroe, Montgomery County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $7,650; ENFORCEMENT COORDINATOR: Sarah Davis, (512) 239-1653; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(46) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2012-1218-PST-E; IDENTIFIER: RN102281896; LOCATION: Hempstead, Waller County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $2,813; Supplemental Environmental Project offset amount of $2,251 applied to Houston Arboretum & Nature Center - Hurricane Ike Habitat Restoration and Removal of Invasive

Species; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3423; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(47) COMPANY: Walter E. Nix, Jr. dba Centerline Water Supply Corporation; DOCKET NUMBER: 2012-0766-PWS-E; IDENTIFIER: RN101439776; LOCATION: Burleson County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), and §290.122(c)(2)(A), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of each quarter and by failing to provide public notice of the failure to submit a DLQOR to the executive director; 30 TAC §290.122(c)(2)(A), by failing to provide public notifications regarding the failure to conduct routine coliform monitoring and regarding the failure to conduct raw groundwater source sampling; and 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect at least five routing distribution coliform samples the month following a total coliform-positive result and by failing to provide public notification of the failure to collect five distribution samples; PENALTY: $3,798; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(48) COMPANY: Woodside Homes of South Texas LLC; DOCKET NUMBER: 2012-2139-WQ-E; IDENTIFIER: RN105462196; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: residential construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 14250 Jusdon Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(49) COMPANY: XTREME COLLISION REPAIR, L. P.; DOCKET NUMBER: 2012-1498-AIR-E; IDENTIFIER: RN106225873; LOCATION: Addison, Dallas County; TYPE OF FACILITY: auto body shop; RULE VIOLATED: 30 TAC §106.436(11)(A) and Texas Health and Safety Code, §382.085(b), by failing to meet the minimum stack height of 1.2 times the height of the tallest building located within 200 feet; PENALTY: $1,213; ENFORCEMENT COORDINATOR: Linda Ndoping, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201205934
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 15, 2012

♦ ♦ ♦

Notice of Correction to Agreed Order Number 29

In the October 5, 2012, issue of the *Texas Register* (37 TexReg 8065), the Texas Commission on Environmental Quality published a notice of Agreed Orders. Agreed Order Number 29, concerning Veslan Properties, Incorporated, which appeared on page 8069, has been revised. The Supplemental Environmental Project should be the National Audubon Society - Mitchell Lake Project, instead of the San Antonio River Authority - San Antonio River Water Quality Monitoring Network.

For questions concerning this error, please contact Debra Barber at (512) 239-0412.

TRD-201205932
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 15, 2012

♦ ♦ ♦

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 101 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed new sections in 30 TAC Chapter 101, concerning General Air Quality Rules, §§101.100 - 101.102, 101.104, 101.106 - 101.110, 101.113, and 101.116 - 101.122, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency concerning SIPs.

The proposed rulemaking would implement the provisions of Federal Clean Air Act (FCAA), §182(d)(3) and (e) and §185 for the Houston-Galveston-Brazoria one-hour ozone nonattainment area to include a requirement for the imposition of a penalty fee for major stationary sources of volatile organic compounds (VOC) located in an area classified as severe or extreme if the area fails to attain the ozone National Ambient Air Quality Standard by the applicable attainment date. The rulemaking will also implement FCAA, §182(f), which requires all SIP requirements that apply for VOC to also apply for emissions of nitrogen oxides (NO_x). The rulemaking will also provide for equivalent alternative options to meet the fee obligation. Major stationary sources are subject to paying a fee of $5,000, as adjusted by the consumer price index, per ton in excess of 80% of a baseline amount of VOC, NO_x, or both. The fee is proposed to be collected annually until the area is redesignated attainment, but collection of the fee may be abated if the area has a design value of attainment.

The commission will hold a public hearing on this proposal in Houston in the Houston-Galveston Area Council at 3555 Timmons Lane, Room A on January 9, 2013, at 2:00 p.m. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2009-009-101-AI. The comment period closes January 14, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Kathy Pendleton, Emissions Assessment Section, (512) 239-1936.

TRD-201205936

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 15, 2012

♦ ♦ ♦

Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act. The proposed amendment is effective January 1, 2013.

The purpose of this amendment is to update the fee schedules in the current state plan by including fees for new services and by modifying fees for existing services. These rate actions are being taken to comply with §355.8085(1)(B), Texas Medicaid Reimbursement Methodology for Physicians and Certain Other Practitioners, under Title 1, Part 15, Chapter 355, Subchapter J, of the Texas Administrative Code, which requires the Health and Human Services Commission to review fees for individual services at least once every two years. After performing the required review, the Health and Human Services Commission has determined that amendments to the fee schedule are appropriate.

Accordingly, the amendments will modify the fee schedules in the Texas Medicaid State Plan as a result of Medicaid fee adjustments for:

Case Management for Children and Pregnant Women;

Dental Services;

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies;

Early and Periodic Screening, Diagnosis, and Treatment Services (EPSDT);

Hearing Aids and Audiometric Evaluations;

Licensed Midwife Services;

Indian Health Services; and

Physicians and Other Practitioners.

The proposed amendment is estimated to result in an additional annual cost of $112,488,601 for federal fiscal year (FFY) 2013, consisting of $111,475,691 in federal funds and $1,012,910 in state general revenue. For FFY 2014, the estimated annual cost is $157,803,754 consisting of $156,365,491 in federal funds and $1,438,263 in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1432; by facsimile at (512) 491-1998; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201205929
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: November 15, 2012

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Request for Qualifications

SUMMARY

The Texas Department of Housing and Community Affairs (the "Department") has issued a Request for Qualifications (RFQ) #2013-332-0377 for an attorney to serve as an independent fact finder to address instances of disputed Quantifiable Community Participation or Public Opposition. The Department anticipates the need for one or more attorneys to serve as independent fact finders to consider the stated basis of neighborhood organization or public opposition to a multifamily development, should such opposition be challenged. An ideal Respondent will have prior experience as a fact finder but will also have prior experience with matters likely to have a bearing on issues related to multifamily development such as familiarity with zoning boards, land use planners, and other matters likely to raise significant budgetary concerns such as emergency response, crime response, traffic, environmental concerns, and foreseeable burdens on local schools. Also, an ideal Respondent will have familiarity with the precepts of the Fair Housing Act.

DEADLINE FOR SUBMISSION

The deadline for submission in response to this RFQ is **4:00 p.m.,** Austin local time, on **Friday, December 7, 2012.** No response will be accepted after the deadline.

Respondents may view the RFQ posting on the Electronic State Business Daily (ESBD) at http://esbd.cpa.state.tx.us/ and you may search by the RFQ number listed above; or you may also click on the following link to directly access the ESBD without having to search: http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=103170; or you may go to our website at www.tdhca.state.tx.us and look under "What's New" on the homepage.

The Department reserves the right to accept or reject any (or all) Responses submitted. The information contained in this request for qualifications is intended to serve only as a general description of the services desired by the Department, and the Department intends to use responses as a basis for further negotiation of specific project details with offerors. This request does not commit the Department to pay for any costs incurred prior to the execution of a contract and is subject to availability of funds. Issuance of this request for qualifications in no way obligates the Department to award a contract or to pay any costs incurred in the preparation of a response.

For additional information concerning the requirements of this request for qualifications, please contact Mr. Jeffrey Pender, Deputy General Counsel, at (512) 475-4752. Communication with any member of the Governing Board of the Department, the Executive Director, or the Department staff other than Mr. Pender, or his assistant, concerning any matter relating to this request for qualifications is grounds for immediate disqualification.

TRD-201205910
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 14, 2012

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application to change the name of LAUIER INDEMNITY COMPANY to ILLINOIS INSURANCE COMPANY, a foreign Fire and/or Casualty company. The home office is in Cedar Rapids, Iowa.

Application for admission to the State of Texas by CARE IMPROVEMENT PLUS SOUTH CENTRAL INSURANCE COMPANY, a Life, Accident and /or Health company. The home office is in Little Rock, Arkansas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201205948
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: November 15, 2012

♦ ♦ ♦

Texas Lottery Commission

Instant Game Number 1488 "Instant Riches"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1488 is "INSTANT RICHES". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1488 shall be $5.00 per Ticket.

1.2 Definitions in Instant Game No. 1488.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, TREASURE CHEST SYMBOL, ONE DOT SYMBOL, TWO DOTS SYMBOL, THREE DOTS SYMBOL, FOUR DOTS SYMBOL, FIVE DOTS SYMBOL, SIX DOTS SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $1,000, and $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO.1488 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRFV
46	FRSX

47	FRSV
48	FRET
49	FRNI
50	FFTY
TREASURE CHEST SYMBOL	WIN
ONE DOT SYMBOL	ONE
TWO DOTS SYMBOL	TWO
THREE DOTS SYMBOL	THR
FOUR DOTS SYMBOL	FOR
FIVE DOTS SYMBOL	FIV
SIX DOTS SYMBOL	SIX
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$250	TWO FTY
$1,000	ONE THOU
$50,000	50 THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00, or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $250, or $500.

H. High-Tier Prize - A prize of $1,000, or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1488), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 1488-0000001-001.

K. Pack - A Pack of "INSTANT RICHES" Instant Game Tickets contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the Pack; the back of Ticket 075 will be revealed on the back of the Pack. There will be no breaks between the Tickets in a Pack. Every other book will reverse i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 075 will be shown on the back of the Pack.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "INSTANT RICHES" Instant Game No. 1488 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "INSTANT RICHES" Instant Game is determined once the latex on the Ticket is scratched off to expose 37 (thirty-seven) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the PRIZE for that NUMBER. If a player reveals a "TREASURE CHEST" Play Symbol, the player wins the PRIZE for that symbol instantly. BONUS: If the total of the two dice is 7, the player wins $50. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 37 (thirty-seven) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut, and have exactly 37 (thirty-seven) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 37 (thirty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 37 (thirty-seven) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have identical patterns of either play symbols or prize symbols.

B. A Ticket will win as indicated by the prize structure.

C. A Ticket can win up to seventeen (17) times.

D. On winning and Non-Winning Tickets, the top cash prizes of $50,000 and $1,000 will each appear at least once, except on Tickets winning seventeen (17) times.

E. On winning Tickets, a non-winning prize amount will not match a winning prize amount.

F. On all Tickets, a prize amount will not appear more than 3 times, except as required by the prize structure to create multiple wins.

G. This Ticket consists of sixteen (16) YOUR NUMBERS, sixteen (16) PRIZE symbols, three (3) WINNING NUMBERS and two (2) dice symbols.

H. All WINNING NUMBERS on a ticket will be different from each other.

I. All YOUR NUMBERS on a Ticket will be different from each other, except as required by the prize structure to create multiple wins.

J. Tickets winning more than one (1) time will use as many WINNING NUMBERS as possible to create matches.

K. On Non-Winning Tickets, a WINNING NUMBER will never match a YOUR NUMBER.

L. The TREASURE CHEST symbol will never appear as a WINNING NUMBER.

M. The TREASURE CHEST symbol will never appear on Non-Winning Tickets.

N. The TREASURE CHEST symbol will appear no more than one (1) time on a Ticket.

O. BONUS PLAY AREA: Players can win one (1) time in this play area.

P. BONUS PLAY AREA: This play area in this game will consist of two (2) dice symbols and a "+" sign.

2.3 Procedure for Claiming Prizes.

A. To claim a "INSTANT RICHES" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, or $500, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $250, or $500 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "INSTANT RICHES" Instant Game prize of $1,000, or $50,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas

Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "INSTANT RICHES" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "INSTANT RICHES" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "INSTANT RICHES" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,200,000 Tickets in the Instant Game No. 1488. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1488 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	944,000	7.63
$10	672,000	10.71
$15	176,000	40.91
$20	64,000	112.50
$50	81,000	88.89
$100	28,740	250.52
$250	2,460	2,926.83
$500	1,920	3,750.00
$1,000	110	65,454.55
$50,000	10	720,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.65. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1488 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1488, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201205925
Bob Biard
General Counsel
Texas Lottery Commission
Filed: November 15, 2012

♦ ♦ ♦

Notice of Public Comment Hearing

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in this document is not included in the print version of the Texas Register. The figure is available in the on-line version of the November 30, 2012, issue of the Texas Register.)

A public hearing to receive public comments regarding proposed amendments to the Texas Lottery Commission procedure Winner Payment Processing and Review, OC-WP-001, a procedure that affects Lotto Texas® players, will be held on Monday, January 7, 2013, at 11:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission, at (512) 344-5113 at least 72 hours prior to the public hearing.

The proposed amendments incorporate processing revisions for the Texas Lottery Commission's new gaming system. The Texas Lottery Commission has determined that information that is confidential by law, because it goes to the security of the operation of the lottery, is contained within this procedure. The confidential information has been redacted within the procedure included in this notice.

TRD-201205914
Bob Biard
General Counsel
Texas Lottery Commission
Filed: November 14, 2012

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) to withdraw services pursuant to P.U.C. Substantive Rule §26.208(h).

Docket Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas to Withdraw Broadband Educational Videoconferencing Service, Pursuant to Substantive Rule §26.208(h). Docket Number 40888.

The Application: On October 29, 2012, pursuant to P.U.C. Substantive Rule §26.208(h), Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas or the Applicant) filed an application with the commission to withdraw Broadband Educational Videoconferencing Service. AT&T Texas stated that there have been no subscribers to this service for the past two years. Since there are no subscribers to the service, AT&T Texas has no provisions for grandfathering or competitive alternatives. The proceedings were docketed and suspended on October 30, 2012, to allow adequate time for review and intervention.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing- and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Docket Number 40888.

TRD-201205972
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2012

♦ ♦ ♦

Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) to withdraw services pursuant to P.U.C. Substantive Rule §26.208(h).

Docket Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas to Withdraw Miscellaneous Components of Analog Private Line Service Pursuant to Substantive Rule §26.208(h). Docket Number 40889.

The Application: On October 29, 2012, Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas) filed an application with the commission to withdraw Miscellaneous Components of Analog Private Line Service. AT&T Texas stated that there have been no subscribers to this service for the past two years. Since there are no subscribers to the service, AT&T Texas has no provisions for grandfathering or competitive alternatives. The proceedings were docketed and suspended on October 30, 2012, to allow adequate time for review and intervention.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing- and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Docket Number 40889.

TRD-201205973
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2012

♦ ♦ ♦

Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) to withdraw services pursuant to P.U.C. Substantive Rule §26.208(h).

Docket Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas to Withdraw MicroLink II Service Pursuant to Substantive Rule §26.208(h) - Docket Number 40890.

The Application: On October 29, 2012, pursuant to P.U.C. Substantive Rule §26.208(h), Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas) filed an application with the commission to withdraw MicroLink II Service. AT&T Texas stated that there have been no subscribers to this service for the past two years. Since there are no subscribers to the service, AT&T Texas has no provisions for grandfathering or competitive alternatives. The proceedings were docketed and suspended on October 30, 2012, to allow adequate time for review and intervention.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing- and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll free) (800) 735-2989. All inquiries should reference Docket Number 40890.

TRD-201205974
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 16, 2012

♦ ♦ ♦